Special Contribution

Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence

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"The object of all legal investigation is the discovery of truth."[1]

"You can't handle the truth." Jack Nicholson, A FEW GOOD MEN[2]

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1. O.C.G.A. § 24-1-2 (2010).
2. A FEW GOOD MEN (Columbia Pictures 1992).

I. LET'S DANCE

Georgia has become the forty-fourth state to model its new evidence rules on the Federal Rules of Evidence.[3] The new code will go into effect on January 1, 2013,[4] 150 years from when Georgia's first legal code was published.[5] Passage of the 2013 Georgia Evidence Code did not come easy, but was a product of years of debate, compromise, and vetting from legislators, the judiciary, academia, and members and groups of the practicing bar. The new code is largely derived from the Federal Rules of Evidence, but Georgia has retained a significant amount of evidence rules from its prior code and rejected certain provisions of the Federal Rules of Evidence. This Article reviews the history of Georgia's evidence rules and the efforts to amend them, summarizes the changes between the current Georgia Evidence Code

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3. Ga. H.R. Bill 24, Reg. Sess. [hereinafter HB 24] (codified as amended in scattered sections of O.C.G.A. tits. 24 to 35 (Supp. 2011)) (effective Jan. 1, 2013), *available at* http://www.legis.ga.gov/Legislation/en-US/display.aspx?Legislation=31996; *see also* 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE T-1 [Mar. 2010] (Joseph M. McLaughlin ed., 2d ed. 2011) (reporting that at the time of publication forty-two states have modeled their rules on the Federal Rules of Evidence). Illinois was the forty-third state to adopt an evidence code derived from the Federal Rules of Evidence, approving new rules on September 27, 2010, which became effective on January 1, 2011. *See Special Supreme Court Committee on Evidence,* IN RE ILLINOIS RULES OF EVIDENCE, MR 24138 (Sept. 27, 2010), http://www.state.il.us/court/SupremeCourt/Evidence/Evidence.pdf. California, Kansas, Massachusetts, Missouri, New York, and Virginia are the six states that have not adopted the framework of the Federal Rules of Evidence. *See* 6 WEINSTEIN & BERGER, *supra* at T-8. Around 2002, the California Law Revision Commission ordered a study to determine whether its evidence code should be amended to conform to the Federal Rules "either to improve the California rule or for the sake of uniformity." *California Law Revision Commission*, COMPARISON OF EVIDENCE CODE WITH FEDERAL RULES: INTRODUCTION OF STUDY AND DEFINITION OF HEARSAY, MEMO 2002-41 (Aug. 29, 2002), http://www.clrc.ca.gov/pub/2002/MM02-41.pdf. The background study consisted of a series of discrete parts, with the final installment being submitted to the commission in 2009. Miguel A. Méndez, *IX. General Provisions: Conforming the California Evidence Code to the Federal Rules of Evidence*, 44 U.S.F. L. REV. 891, 892 (2010). However, the project is apparently on hold. *See California Law Revision Commission*, REVIEW OF CALIFORNIA EVIDENCE CODE (last updated Nov. 19, 2009), http://www.clrc.ca.gov/K200.html#Minutes. Massachusetts has not adopted a set of rules of evidence but encourages the use of the MASSACHUSETTS GUIDE TO EVIDENCE (Feb. 2011), http://www.mass.gov/courts/sjc/guide-to-evidence/massguidetoevidence.pdf. The guide is organized and numbered like the Federal Rules of Evidence and includes notations in every section that explain when the rules are identical or similar to the Federal Rules of Evidence or how they depart from them. *See id.*

4. Ga. H.R. Bill 24 § 1, ll. 19-21.

5. *See* PAUL S. MILICH, GEORGIA RULES OF EVIDENCE § 1:1 (2010).

and the 2013 Georgia Evidence Code, and explains the notable differences between the 2013 Georgia Evidence Code and the Federal Rules of Evidence.

II. GOLDEN YEARS: THE HISTORY OF GEORGIA'S EVIDENCE CODE

A. Creation of Georgia's Evidence Code

1. National Codification Movement. In 1858, the Georgia General Assembly appointed three commissioners to draft a condensed legal code that embodied the laws of Georgia as then recognized by Georgia courts, including the rules of evidence.[6] The push for codification in Georgia "was a product of the national codification movement of the mid-19th century."[7] Many states' rules were based on decisional law, and where state statutory collections did exist in the early nineteenth century, they were arranged either chronologically with no regard to subject matter or by broad topics that became confusing over time.[8] Several states looked to improve the compilations of their laws through codification during this time, including New York, Virginia, Alabama, Kentucky, and Georgia.[9]

The merits of codification were hotly debated in the various states.[10] Opponents questioned whether codification could even be accomplished, criticized the cost, and proclaimed that a code would result in upheaval and confusion, though these criticisms were unsupported by specific authority.[11] Proponents pointed out the obvious advantages that a code offered, namely that a simplified set of laws organized into chapters and titles and condensed to reduce redundancies in existing law would "place [the laws] within the knowledge of the citizens of the State," or in other words, make them more accessible.[12] Georgia legislators recognized

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6. *Id.*; Givens v. Ichauway, Inc., 268 Ga. 710, 716, 493 S.E.2d 148, 154 (1997) (Fletcher, P.J., dissenting) (citations omitted). Judge David Irwin was one of the three commissioners and prepared the Code of Practice, which included the evidence rules. MILICH, *supra* note 5.

7. MILICH, *supra* note 5; *see generally* Erwin C. Surrency, *The Georgia Code of 1863 and Its Place in the Codification Movement*, 11 J.S. LEGAL HIST. 81 (2003).

8. Surrency, *supra* note 7, at 83, 85.

9. *Id.* at 85-89.

10. *Id.* at 83-86.

11. *Id.* at 84, 86.

12. *Id.* at 87 (citation and internal quotation marks omitted); MILICH, *supra* note 5.

that a simplified code would allow its citizens to secure a "more speedy and certain attainment of the ends of justice."[13]

2. Enactment of the Georgia Code. The commissioners finished drafting Georgia's first legal code in 1860 and met with a committee of the General Assembly to examine the proposed code section by section.[14] The code was derived from several sources, including the following: Georgia common law, the Georgia Constitution, Georgia statutes, Georgia Supreme Court decisions, English statutes, the civil and canon law of England (to the extent they were recognized in Georgia), Blackstone's *Commentaries*,[15] Professor Simon Greenleaf's *Treatise on the Law of Evidence*,[16] and interestingly, Alabama's code.[17] It was divided into four parts, and the evidence provisions were included in Part III, the Practice Code.[18] Many of the evidentiary principles in the proposed code were taken from the contemporary texts of that time period with a few of the evidence sections being taken from then-existing Georgia statutes.[19]

The General Assembly committee made some modifications to the code and recommended that the legislature accept it as edited without attempting to dissect it again section by section.[20] The General Assembly accepted this suggestion and adopted the code as drafted in 1860 with an effective date of January 1, 1862.[21] However, the code was not published until 1863 (Code of 1863 or Code) due to the Civil War and a resulting shortage of "quality paper stock," and the Code was further changed in the interim.[22] One author noted that "[i]t can be

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13. Surrency, *supra* note 7, at 87 (internal quotation marks omitted); Resolution of Dec. 20, 1847, 1847 Ga. Laws 311.

14. Surrency, *supra* note 7, at 90. Before meeting with the committee, the commissioners gathered in Atlanta to go through the proposed code by themselves, section by section, with sessions lasting from 8:00 a.m. until evening every day of the week until the task was completed. *Id.*

15. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).

16. SIMON GREENLEAF, TREATISE ON THE LAW OF EVIDENCE (1883).

17. Surrency, *supra* note 7, at 89, 98 (reporting that the sponsor of the bill calling for a commission to be formed to draft a code stated that the code was to be "modeled if practicable, upon the present code of Alabama") (internal quotation marks omitted); Act of Dec. 9, 1858, 1858 Ga. Laws 95; MILICH, *supra* note 5.

18. Surrency, *supra* note 7, at 92, 94.

19. *Id.* at 95.

20. *Id.* at 90.

21. *Id.*

22. MILICH, *supra* note 5; Surrency, *supra* note 7, at 96; Paul S. Milich with Introduction by Robert D. Ingram, *A Brief Overview of the Proposed New Georgia Rules of Evidence*, GA. B.J. 30, 31 (Aug. 2007) [hereinafter Milich & Ingram]. The Code of 1863 is also referred to as Cobb's Code, after Thomas R. Cobb, one of the commissioners. *See id.*

claimed that practice in the Georgia courts was definitely simpler than practice in other jurisdictions at that period" as a result of the codification of Georgia's evidence rules.[23]

B. Problems with the Georgia Evidence Code Over Time

The Georgia Evidence Code as currently drafted is derived from the Code of 1863, but it has been amended and reorganized, and new statutes have been enacted over time.[24] Courts have filled in the gaps inevitably left by an abbreviated code and tackled unforeseen developments through common law, sometimes with inconsistent applications.[25] The new amendments, statutes, and common law have resulted in an unwieldy body of law that has produced the same criticisms noted above that prompted the enactment of Georgia's code in the first place, including disorganization, inconsistency, and inaccessibility.[26] Critics also claim that the Georgia Evidence Code is antiquated and, as a result of the foregoing, is cost-prohibitive, which can lead to unjust results.[27]

1. Disorganization and Inconsistency Resulting in Inaccessibility. One criticism voiced about the Georgia Evidence Code is its organization.[28] Though most of the evidence rules are found in Title 24 of the Official Code of Georgia Annotated (O.C.G.A.),[29] over 100 evidence statutes are found in other titles of the Code.[30] Statutes

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23. *See* Surrency, *supra* note 7, at 95.

24. Video: *Georgia House of Representatives Judiciary Committee Proceedings* (Feb. 8, 2011), 33m, *available at* http://www1.legis.ga.gov/legis/2011_12/house/Committees/judiciary-/judyArchives.htm [hereinafter Feb. 8, 2011 House J. Comm. Video] (remarks by Rep. Wendell Williard (R-49th)); MILICH, *supra* note 5; Milich & Ingram, *supra* note 22, at 31; *see also* Daniel Hendrix et al., Recent Development, *Evidence*, 27 GA. ST. U.L. REV. 1, 2 (stating that "[t]he last major revision of the Georgia Evidence Code, Title 24, was enacted in 1863").

25. MILICH, *supra* note 5; Milich & Ingram, *supra* note 22, at 31.

26. *See, e.g.*, MILICH, *supra* note 5.

27. *Id.*; *see also* Hendrix et al., *supra* note 24, at 2-3; Feb. 8, 2011 House J. Comm. Video, *supra* note 24, at 47m (remarks by Thomas M. Byrne).

28. MILICH, *supra* note 5.

29. O.C.G.A. tit. 24 (2010 & Supp. 2011).

30. MILICH, *supra* note 5, § 1:1 & appx. (listing approximately 106 evidence statutes in titles 3, 5, 7, 9-11, 15-17, 19-20, 22, 26, 29, 31, 33-34, 40-46, 48-53).

addressing the same subject matter can be found in various titles,[31] increasing the risk that they may be overlooked.

Moreover, courts have created new evidence rules through common law.[32] Photography, telephone records, computer-generated documents, and online social networking sites are all developments that have come into existence since the Code's enactment.[33] The Georgia Evidence Code can be applied for some of these developments, but not all.[34] Moreover, in some cases, courts have nearly abandoned the evidence statutes altogether.[35] As a result, "'the rule' is not necessarily found in the statutes," and the cases that have swallowed or abrogated the rule are not always consistent.[36] The resulting disorganization and inaccessibility imposes additional costs on an already overburdened trial and appellate system.[37]

2. The Georgia Evidence Code is Outdated. Critics of the Georgia Evidence Code have also argued that the rules are outdated.[38] Indeed, the 2011 Evidence Study Committee Chair, Thomas M. Byrne, went so far as to state that "[i]t's not hypercritical to say that Georgia has the most antiquated and worst set of evidence statutes and lore of any of the fifty states."[39] For example, under Georgia law, hearsay is treated as "illegal testimony," and a party cannot waive an objection to

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31. *Id.* For example, evidentiary statutes dealing with privileges are, for the most part, in Title 24. *See, e.g.,* O.C.G.A. §§ 24-9-20 to -30 (2010) (specifying qualified communications between husband and wife, attorney and client, psychiatrist and patient, and with clergyman, etc. are privileged). However, some are included in other titles. *See, e.g.*, O.C.G.A. §§ 43-3-32 and 43-39-16 (2011) (accountant-client privilege and patient-licensed psychologist privilege).

32. MILICH, *supra* note 5.

33. Hendrix et al., *supra* note 24, at 2-3. Paul Milich, *Court Rules Will Benefit Public*, Op-Ed., ATLANTA J. CONST., May 26, 2011, at A19.

34. Hendrix et al., *supra* note 24, at 2-3 (citation omitted) (noting that the evidence statutes do not deal with photo and video evidence). When confronted with new technologies, courts have utilized common law principles. *See, e.g.*, Almond v. State, 274 Ga. 348, 349, 553 S.E.2d 803, 805 (2001) (stating that the record reflected that the digital "pictures were introduced only after the prosecution properly authenticated them as fair and truthful representations of what they purported to depict" and "[w]e are aware of no authority, and appellant cites none, for the proposition that the procedure for admitting pictures should be any different when they were taken by a digital camera").

35. Milich & Ingram, *supra* note 22, at 31.

36. *Id.*

37. *See id.*

38. *See, e.g.*, MILICH, *supra* note 5; Hendrix et al., *supra* note 24, at 2-3.

39. Feb. 8, 2011 House J. Comm. Video, *supra* note 24, at 44m (remarks by Thomas M. Byrne).

this kind of evidence at trial.[40] Thus, a party can successfully appeal a ruling or verdict based on hearsay even if considered or admitted without objection, leading to added costs for the courts and parties by allowing a party to appeal and retry a case.[41] Georgia is the only state to consistently and pervasively apply this rule, even as recently as 2011; the overwhelming majority of states hold that inadmissible hearsay can be considered and uphold a verdict when no objection is made.[42] Moreover, some of the exceptions to common law evidence rules developed by Georgia courts are inconsistent with, or have become nonexistent in, other states' rules.[43] For example, many states have deleted the res gestae exception to the hearsay rule from their evidence rules.[44] Res gestae is Latin for "things done"[45] and is an exception created to allow in as evidence spontaneous statements made by an out-of-court declarant about an event occurring near the time of the event as evidence.[46] The Georgia Evidence Code retains this exception, which

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40. Smith v. State, 123 Ga. App. 269, 271, 180 S.E.2d 556, 558 (1971) ("Hearsay testimony (illegal testimony) has no probative force whatsoever, and its only effect is to prejudice the minds of the jury against the party against whom such hearsay evidence is introduced, and, this being so, the question of waiver by failing to file a timely objection does not arise.") (quoting Rushin v. State, 63 Ga. App. 646, 647-48, 11 S.E.2d 844, 845 (1940)) (internal quotation marks omitted).

41. *See id.*; Hendrix et al., *supra* note 24, at 3 (citation omitted).

42. *See generally,* J.A. Bock, Annotation, *Consideration, in Determining Facts, of Inadmissible Hearsay Evidence Introduced Without Objection*, 79 A.L.R.2d 890 (1961 & Supp. 2010). Texas and New York are two other states that follow the minority rule, albeit inconsistently, that hearsay cannot support a verdict even where admitted without objection. *Id.* at §§ 2, 28-29. New York has applied the minority rule as recently as 1998, but a cursory review of the cases from it and other minority-rule states indicate that the modern trend in these jurisdictions is to follow the majority rule, except in Georgia. *See id.* at §§ 28-30; *compare* Boise St. Car Co. v. Van Avery, 103 P.2d 1107, 1115 (Idaho 1940) (reversing verdict based entirely on hearsay), *with* Phillips v. Erhart, 254 P.3d 1, 6 (Idaho 2011) (inadmissible hearsay could be considered by jury where evidence was admitted without objection). The United States Court of Appeals for the Eleventh Circuit follows the majority rule: "[I]t is clear that [a party, even where the declarant is its own witness] is bound by answers that are hearsay, if not objected to . . . . Even in a court of law, if evidence of this kind [hearsay] is admitted without objection, it is to be considered, and accorded its natural probative effect, as if it were in law admissible." Morris v. U.S., Dep't of Treasury, 813 F.2d 343, 347-48 (11th Cir. 1987) (emphasis omitted).

43. Hendrix et al., *supra* note 24, at 3.

44. *Id.*; Milich & Ingram, *supra* note 22, at 32.

45. Thompson v. State, 166 Ga. 512, 516, 143 S.E. 896, 900 (1928) (Russell, C.J., dissenting) (internal quotation marks omitted).

46. O.C.G.A. § 24-3-3 (2010) ("Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part of the res gestae.").

has been "'a source of confusion, consternation, and cost in our courts' because there is no consistent body of law on the subject."[47]

An example of an exception maintained by Georgia courts not found in any other state is the "bent of mind" rule.[48] Georgia generally prohibits the use of character evidence to show that a person acted in conformity with their alleged character at the time in question, or in other words, Georgia prohibits the use of extrinsic act evidence to show a propensity for acting a certain way.[49] The bent of mind exception essentially swallows the rule by allowing a court to admit evidence of a person's "'*predisposition* to commit a crime because they committed [it] before' as 'proof of character in order to show action in conformity therewith.'"[50]

One consequence critics have cited of maintaining rules that are not uniform or consistent with other states is that companies may be discouraged from doing business in Georgia because they do not "know what they'll get" if they have to go to court in Georgia.[51] Additionally, "[w]ith the liberalization of pre-trial discovery, growth in the use of experts, and the increase in the education and experience of the average

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47. Hendrix et al., *supra* note 24, at 3 (citing Student Observation of the Senate Committee Meeting (Apr. 15, 2010) (remarks by Prof. Paul Milich) (on file with Georgia State University Law Review)).

48. MILICH, *supra* note 5, § 11:13; *see also* Wade v. State, 295 Ga. App. 45, 48, 670 S.E.2d 864, 866 (2008); *see, e.g.*, Hansen v. State, 205 Ga. App. 604, 606, 423 S.E.2d 273, 275 (1992) (holding that prior incidences of drunk driving were admissible to demonstrate "the defendant's motive, bent of mind, and propensity for committing the same type of offense. It was to show, as the court noted, that Hansen engaged in this type of conduct, i.e., driving after drinking alcohol without exigent circumstances, so as to discredit his version, that he would not have driven without the perceived threat to his safety. There was a legitimate purpose for the other-crimes evidence.").

49. MILICH, *supra* note 5, § 11:1; O.C.G.A. § 24-2-2 (2010); Farley v. State, 265 Ga. 622, 628, 458 S.E.2d 643, 648 (1995) (Sears, J., specially concurring) (footnote omitted) ("Character evidence is excluded because a jury must determine a defendant's guilt or innocence based solely on evidence relevant to the crime charged, and not based on a belief that the defendant has a criminal character or a general propensity to commit bad acts.").

50. Hendrix et al., *supra* note 24, at 4; Video: *Georgia House of Representatives Judiciary Committee Proceedings* (Mar. 2, 2009), 34m [hereinafter Mar. 2, 2009 House J. Comm. Video] (remarks by Jack Martin, Georgia Association of Criminal Defense Lawyers) (video on file with Georgia State University Law Review); *see also* MILICH, *supra* note 5, § 11:13 (noting that there is very little "difference between a person's 'bent of mind' and his 'character' or between a person's 'course of conduct' and his propensity to act a certain way"); *Farley*, 265 Ga. at 629, 458 S.E.2d at 649 ("Unfortunately, over the years courts have applied and expanded the exception to the rule prohibiting evidence of an independent act or crime to the extent that the exception often swallows the rule.").

51. Hendrix et al., *supra* note 24, at 4 (citation and internal quotation marks omitted).

juror, the pressure has been to open up the trial–to let in more evidence, more efficiently."[52]

C. Efforts to Amend the Code

Efforts to resolve these problems and modernize and amend the Georgia Evidence Code on a broad scale began in the 1980s, and ultimately, a collective voice emerged to amend and pattern Georgia's Evidence rules after the Federal Rules of Evidence.[53]

1. History of Federal Rules of Evidence. The Federal Rules of Evidence were enacted in 1975, almost fifteen years after Chief Justice Earl Warren appointed a Special Committee on Evidence to study the feasibility and desirability of a uniform set of evidence rules for the federal courts in 1961.[54] University of Georgia Professor Thomas Green prepared a report (Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts) for the Special Committee, recommending that uniform rules be adopted as both feasible and desirable.[55] In his analysis, Green cited frustrations with the law of evidence as voiced by noted legal scholars, lawyers, and judges, including complaints that the law was "too extensive, too complex, [too voluminous], and too uncertain to apply accurately on the spur of the moment," had "uncorrelated and conflicting precedents," had "infinitesimal, meticulous, petty elaboration into a mass not capable of being perfectly mastered and used by everyday judges and practitioners," and that "[u]niformity and simplicity [was] the only cure."[56]

The report was ultimately submitted to an Advisory Committee, and in 1965, the Advisory Committee began to draft what would become the

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52. Paul S. Milich, *The Proposed New Georgia Rules of Evidence*, ST. B. GA. NEWS, www.gabar.org/public/pdf/news/proposed_new_evidence_rules_milich.pdf (last visited Oct. 22, 2011).

53. Hendrix et al., *supra* note 24, at 5.

54. Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129, 133 (1987); *see* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, 30 F.R.D. 73, 81 (1962) [hereinafter Special Committee on Evidence Report] (reporting that a recommendation that uniform rules of evidence be formulated was suggested as early as 1938 and several times thereafter).

55. Special Committee on Evidence Report, *supra* note 54, at 79, 114. The Special Committee was the first among a series of committees to evaluate the adoption of a uniform set of federal rules. Imwinkelried, *supra* note 54, at 133.

56. Special Committee on Evidence Report, *supra* note 54, at 109-10 (citations omitted) (reporting that two professors complained "a picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists").

Federal Rules of Evidence.[57] In 1972, the United States Supreme Court approved the rules,[58] but the Federal Rules of Evidence were not enacted until 1975 after both the House and Senate conducted studies of the rules.[59] There have been several amendments to the Federal Rules of Evidence since their adoption. The Federal Rules consist of sixty-seven individually numbered rules that are divided among eleven articles: Article I (General Provisions), Article II (Judicial Notice), Article III (Presumptions in Civil Actions and Proceedings), Article IV (Relevancy and Its Limits), Article V (Privileges), Article VI (Witnesses), Article VII (Opinions and Expert Testimony), Article VIII (Hearsay), Article IX (Authentication and Identification), Article X (Contents of Writings, Recordings, and Photographs), and Article XI (Miscellaneous Rules).

Since their adoption, "[t]he Federal Rules have been praised for their accessibility," straightforwardness, specificity, and organization, allowing attorneys to use them easily at trial.[60] Indeed, supporters who argued for adopting the Federal Rules of Evidence in some form in Georgia have stated that such an adoption would "mean[] better justice, fewer errors, [and] fewer retrials."[61] These Georgia proponents have also pointed out that the Federal Rules of Evidence "provide great flexibility regarding contemporary media to introduce at trial" and would "encourage[] companies to move to and invest in Georgia" because "Georgia state courts would be in conformity with the federal courts of the United States" and many other state courts.[62] They have also noted the following:

> Achieving uniformity of the rules with the rest of the country would also facilitate the practice of attorneys who try cases across state lines and increase predictability. [Moreover], because all Georgia law students are trained and taught the [Federal Rules of Evidence], adopting them would be relatively swift and intuitive, with minimal retraining cost. Further, ongoing cost would be less than under the current [Georgia Evidence Code] because of a reduced need . . . for retrials based on improperly admitted evidence.[63]

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57. Milich & Ingram, *supra* note 22, at 31.
58. *Id.*
59. *See id.*
60. *Id.*
61. Hendrix et al., *supra* note 24, at 14 (internal quotation marks omitted); Mar. 2, 2009 House J. Comm. Video, *supra* note 50, at 34m (remarks by Jack Martin, Georgia Association of Criminal Defense Lawyers) (emphasis added)).
62. Hendrix et al., *supra* note 24, at 14-15.
63. *Id.* at 15 (citations omitted).

2. Early Efforts to Amend the Georgia Evidence Code (1986-1991). Since the enactment of the Federal Rules of Evidence, Georgia has incrementally adopted some Federal Rules, either in whole or in part, and Georgia courts have applied some of the Federal Rules even when there was no explicit analog in the Georgia Evidence Code.[64] When a specific code section is substantially similar or identical to the Federal Rules of Evidence, Georgia courts have looked to interpretations of the applicable rule by federal courts and those states that adopted the same rules.[65]

Concerted efforts to reform the Georgia Evidence Code and conform it to the Federal Rules of Evidence began in 1986.[66] Then Georgia Bar President Bob Brinson formed an Evidence Study Committee, and its members wrote a set of rules that was introduced in the General Assembly in January 1989 after being passed by the State Bar of Georgia Board of Governors.[67] The senate voted unanimously to approve the bill, but the House Judiciary Committee held up the bill, so it was never considered on the house floor.[68] The Board of Governors again passed a bill proposing to amend the Georgia Evidence Code in 1990, which was introduced in the General Assembly in January 1991.[69] The senate approved the bill with only a few dissenting votes, but the bill was held up in the House Judiciary Committee once again and never reached the house floor.[70] The Evidence Study Committee Chair, Frank C. Jones, attributed the failure to get the bill passed to opposition primarily from the speaker.[71]

3. Recent Efforts to Amend Georgia Evidence Code (2003-Present). The Evidence Study Committee was re-formed in 2003 and in 2005 began "informing and obtaining input from lawyers across the

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64. *See* Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law,* 61 MERCER L. REV. 135, 143-44, 150 (2009) [hereinafter 2009 Treadwell].

65. *See, e.g.*, Allen v. State, 286 Ga. 392, 395, 687 S.E.2d 799, 802 (2010).

> Because the language of [O.C.G.A.] § 24-9-84.1(b) mirrors that of Rule 609(b) of the Federal Rules of Evidence and the statutes based on Rule 609(b) that have been enacted by several other states, we look for guidance to the judicial decisions of the federal courts construing Rule 609(b) and the courts of our sister states construing their statutes modeled on Rule 609(b).

Id.

66. Hendrix et al., *supra* note 24, at 5.

67. Milich & Ingram, *supra* note 22, at 30; Hendrix et al., *supra* note 24, at 5.

68. Hendrix et al., *supra* note 24, at 5.

69. *Id.*

70. *Id.*

71. Milich & Ingram, *supra* note 22, at 30.

state about the proposed changes" to the Georgia Evidence Code through presentations and meetings.[72] In 2008, a joint legislative committee produced the first draft of House Bill (HB) 24.[73] HB 24 received strong opposition from solicitors and prosecutors, and thus the committee did not proceed further.[74]

In 2009, efforts renewed again and, in an attempt to meet the concerns that had stymied the bill in 2008, the head of the Georgia Association of Solicitors-General was added to the Evidence Study Committee to revise the bill.[75] The committee discussed the differences between the Georgia Evidence Code and the Federal Rules of Evidence and, just as the commissioners did with the Code of 1983, analyzed the proposed rules section by section.[76] The bill was again introduced in the house, and the Committee on Judiciary considered several amendments, some of which passed and some of which failed.[77] Prosecutors still voiced criticisms about the bill and specifically noted concerns about "potential changes to existing Georgia policy, training cost, lack of uniformity with the language of the [Federal Rules of Evidence], and even disput[ed] the amount of support across the state for the reform effort."[78] Prosecutors also voiced opposition to the bill's proposal to remove the "bent of mind" exception to the character evidence rules and replace it with Federal Rule of Evidence 404(b),[79] which would not permit the state to admit evidence of similar DUI transactions as the bent of mind exception permitted.[80] With these concerns voiced, the bill never came before the house floor, and the bill died.[81]

HB 24 came before the House Committee on Judiciary again in 2010, "this time with several 'proposed modifications' to address the prosecutors' concerns, including how the Rules would be interpreted by courts and

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72. *Id.*; Hendrix et al., *supra* note 24, at 5.

73. Hendrix et al., *supra* note 24, at 5. HB 24 was aptly named since its largest impact was to Title 24 of the code, as more fully examined below.

74. *Id.*; *see also* Marc T. Treadwell, *Evidence, Annual Survey of Georgia Law,* 60 MERCER L. REV. 135 (2008) (claiming that the proposed rules "did not receive serious attention in the 2008 session of the General Assembly").

75. Hendrix et al., *supra* note 24, at 5.

76. *Id.* at 5-6.

77. *Id.* at 7.

78. *Id.* at 8 (citations omitted).

79. FED. R. EVID. 404(b).

80. *See* Hendrix et al., *supra* note 24, at 8 (noting that the head of the Georgia Association of Solicitors-General argued that adopting Federal Rule of Evidence 404(b) would not allow prosecutors to admit a defendant's prior DUI convictions in any of the defendant's subsequent DUI cases, as a review of other states adopting the Federal Rules of Evidence were not permitted to do so).

81. *Id.*

practitioners."[82] Fourteen proposed amendments were outlined for the committee, and several substantive and procedural changes were debated.[83] Perhaps the most significant compromise with prosecutors was a new addition to proposed O.C.G.A. § 24-4-417,[84] clarifying that a defendant's prior DUI convictions and arrests could be used in subsequent DUI prosecutions of the same defendant.[85]

Compromise was reached with regard to other provisions, and HB 24 was read in the house and passed by a vote of 150 to 12 on March 17, 2010.[86] On March 18, 2010, the senate read HB 24 and assigned it to the Senate Judiciary Committee.[87] During the first hearing on the bill, several members of the committee expressed general concerns about the bill, including a concern that it "appeared HB 24 enacted 'substantially more' than just the [Federal Rules of Evidence], touching on many areas outside Title 24."[88] Though one committee member urged the other members to table the bill in light of these concerns, the bill was favorably reported, and the senate read HB 24 for a second time on April 24, 2010.[89] However, no one requested that the bill be brought to the floor for a vote by the full senate, and thus the bill stalled again.[90]

HB 24 was revived in the 2011 legislative session, marking the state's third attempt in three sessions to amend the Georgia Evidence Code. The same bill that died in the senate without a vote in the 2010 legislative session was reintroduced, with the only change being the effective date, which was pushed from January 1, 2012, to January 1, 2013, to reflect the legislative year gap in passing the rules.[91] As the

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82. *Id.* at 9 (citation omitted).

83. *Id.*

84. O.C.G.A. § 24-4-417 (Supp. 2011) (effective Jan. 1, 2013).

85. *See* Hendrix et al., *supra* note 24, at 9-10.

86. *Id.* at 11.

87. *Id.* at 11-12.

88. *Id.* at 12 (citing remarks by Senator John Wiles (R-37th) and noting that the discussions expressed in the Senate Judiciary Committee were analogous to the discussions in the House Judiciary Committee).

89. *Id.*

90. *Id.*

91. Feb. 8, 2011 House J. Comm. Video, *supra* note 24, at 35m (remarks by Rep. Wendell Willard (R-49th)); Ga. H.R. Bill 24, Reg. Sess (2010) (unenacted), *available at* http://www.legis.ga.gov/Legislation/en-US/display.aspx?Legislation=25890 (noting Jan. 1, 2012, effective date); Ga. H.R. Bill 24, Reg. Sess. (initial draft presented to the house in the 2011-2012 session), *available at* http://www.legis.ga.gov/legislation/en-US/displaydoc.aspx?doc=http://www.legis.ga.gov/Legislation/20112012/108057.pdf [hereinafter 2011 Draft HB 24] (noting Jan. 1, 2013, effective date). Representative Willard, one of six house representatives who sponsored HB 24 for the 2011 legislative session, asked the clerk to keep the bill number (24) the same as in previous years. Feb. 8, 2011 House J. Comm. Video, *supra* note 24, at 35m.

bill was vetted and debated extensively in previous years, only two proposed amendments were sent to the House Committee on Judiciary along with the bill for consideration.[92] Indeed, during the hearing various proponents spoke to note the widespread and overwhelming support for the bill, with the Vice-Chair of the Evidence Committee of the State Bar noting:

> [T]his kind of unanimity among the state's lawyers is about as rare as an albino solar eclipse . . . you just don't see it, but the time really has come; the ease of use as a work tool of these rules for lawyers and judges will lead to much greater predictability, much more efficiency, and better justice really for all of Georgians.[93]

The first amendment considered was to the proposed O.C.G.A. § 24-8-804(b)(3),[94] the statement-against-interest rule, and the amendment advocated bringing that section in line with the amended language of Federal Rule 804.[95] As drafted, the statute tracked the language of Federal Rule 804(b)(3) that was effective until December 1, 2010, which provided the following:

> (b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the

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92. Feb. 8, 2011 House J. Comm. Video, *supra* note 24, at 20m (remarks by Rep. Wendell Willard (R-49th)); *Id.* at 42m (remarks by Mike Jacobs (R-80th)) ("[B]ecause the bill has already been through the ringer with this committee and through the entire legislative process and the study committee that existed prior to that, I don't think we need to rehash the provisions of the bill.").

93. *Id.* at 45m. Opposition was only voiced by one speaker. *Id.* at 54m (remarks by Robert Dudley, Esq.) (voicing concern, inter alia, that an overhaul of the entire evidence provisions was unneeded and had uncalculated costs of retraining the bench and bar and in having to litigate issues that had already been settled through previous decisions).

94. *See* 2011 Draft HB 24, *supra* note 91, § 2, at l. 1207.

95. Feb. 8, 2011 House J. Comm. Video, *supra* note 24, at 36m (remarks by Prof. Paul Milich) (noting "the consensus was, as we reached the end stage of this, that we would track the Federal Rules of Evidence as much as possible so that there would be greater certainty in state courts when they were using that language that was interpreted in other jurisdictions, particularly the federal courts"); *see also* FED. R. EVID. 804.

> accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[96]

The amendment proposed replacing that provision with the new amended language of Federal Rule 804(b)(3) that went into effect after December 1, 2010, which provides the following:

> (b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> (3) Statement against interest.–A statement that:
> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.[97]

In sum, the effect of the 2010 amendment to Federal Rule 804(b)(3) was to extend the "corroborating circumstances" requirement to declarations against penal interest offered by the defense *and* the prosecution, whereas the text of the former Federal Rule 804(b)(3) only extended the requirement to statements introduced by defendants.[98]

The other proposed amendment was to the proposed O.C.G.A. § 15-1-14[99] dealing with hearing-impaired and foreign language interpret-

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96. FED. R. EVID. 804(b)(3) (effective until Dec. 1, 2010); *see also* 2011 Draft HB 24, *supra* note 91, § 2, at ll. 1206-1212.

97. FED. R. EVID. 804(b)(3) (effective Dec. 1, 2010).

98. Federal Evidence Review, *Public Comment Period Opens on FRE 804(b)(3) Amendment (Part III)*, FEDERAL EVIDENCE REVIEW (Aug. 21, 2008, 1:06 AM), http://federalEvidence.com/node/144. Despite the text's limitation, some courts applied the corroborating requirement to statements introduced by the prosecution even before the amendment, including the Eleventh Circuit. Feb. 8, 2011 House J. Comm. Video, *supra* note 24, at 37m (remarks by Prof. Paul Milich) (pointing out that the Eleventh Circuit applied the rule to statements introduced by the prosecution before Federal Rule of Evidence 804(b)(3) was amended in advocating that the amendment to proposed O.C.G.A. § 24-8-804(b)(3) be passed); *see, e.g.*, United States v. Shukri, 207 F.3d 412, 417-18 (7th Cir. 2000). Of note, the Federal Advisory Committee on Evidence Rules considered and rejected three other changes to Federal Rule of Evidence 804(b)(3) in light of conflicting court decisions, including a change to make it applicable to civil cases and to define the meaning of "corroborating circumstances." Advisory Committee on Evidence Rules, REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES (May 12, 2008), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV_Report.pdf. The Georgia House Committee on Judiciary did not mention or debate these changes.

99. 2011 Draft HB 24, *supra* note 91, § 20.

ers.[100] The proposed amendment sought to strike paragraph (b), which proponents of the amendment argued that, if left in, could be construed to mean that only court-qualified–namely, someone who has gone through certain testing and attained certification–interpreters would be recognized in the courts, which was not intended.[101] Both amendments were passed along with another non-substantive amendment, and the committee unanimously voted to pass the bill.[102] However, the bill was recommitted to the committee for rehearing only a few days later to change an inadvertent *shall* to *may* in the proposed O.C.G.A. § 24-8-826,[103] a recodification of Georgia's medical narrative statute, O.C.G.A. § 24-3-18.[104] The amendment passed, and the bill went back up to the house and then to the senate.[105]

On April 14, 2011, the last day of the 2011 legislative session, the senate passed HB 24 by a vote of 50 to 3, despite the threat of a pair of last minute "poison pill" amendments proposed by Senator Bill Cowsert (R-Athens) on the senate floor.[106] The two proposed amendments

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100. Feb. 8, 2011 House J. Comm. Video, *supra* note 24, at 39m (remarks by Rep. Wendell Willard (R-49th)).

101. *Id.* at 40m.

102. *Id.* at 67m.

103. 2011 Draft HB 24, *supra* note 91, § 2, at l. 1283.

104. Video: *Georgia House of Representatives Judiciary Committee Proceedings* (Feb. 17, 2011), 55m, *available at* http://www1.legis.ga.gov/legis/2011_12/house/Committees/judiciary/judyArchives.htm [hereinafter Feb. 17, 2011 House J. Comm. Video] (remarks by Rep. Wendell Willard (R-49th)) (likening the bill's subsequent appearance before the committee to GROUNDHOG DAY, a movie where the main character wakes up on the same day everyday). The statute at issue in its current form allows medical reports in narrative form to be admitted as evidence and states that "[a] statement of the qualifications of the person signing the report *may* be included as part of the basis for providing the information contained therein. . . ." O.C.G.A. § 24-3-18 (2010) (emphasis added) . In advocating for the amendment, Bill Clark of the Georgia Trial Association remarked that the change from *may* to *shall* had never been discussed amongst lawmakers and would create a new waive of litigation where parties would seek to exclude the reports if a statement of the qualifications was not included in the same. Feb. 17, 2011 House J. Comm. Video, *supra*, at 3m (remarks by Bill Clark).

105. *See* Status History of Ga. H.R. Bill 24, Reg. Sess. (codified as amended in scattered sections of tits. 24 to 35 (Supp. 2011) (effective Jan. 1, 2013)), http://www.legis.ga.gov/legislation/en-US/display/31996 [hereinafter Status History of HB 24].

106. *Id.*; Kathleen Baydala Joyner, *Approval of Evidence Rules Rewrite Ends 20-year Quest*, FULTON CNTY. DAILY REP. 1 (Apr. 15, 2011).

failed with very little support.[107] Georgia Governor Nathan Deal signed HB 24 into law on May 3, 2011.[108]

D. The Application of Federal Precedent to the 2013 Georgia Evidence Code

The new evidence code becomes effective on January 1, 2013, and applies to any motion, hearing, or trial starting on or after that date, even if the lawsuit was instituted before the effective date.[109] A more complex issue is what application, if any, federal precedent has to the 2013 Georgia Evidence Code. House Bill 24, Section 1, provides:

> It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is consistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the [F]ederal [R]ules of [E]vidence, the General Assembly considered the decisions of the [United States Court of Appeals for the Eleventh Circuit.][110]

Section 1 of HB 24 appears to state that the Georgia General Assembly intended to limit the application of federal precedent to the Federal Rules adopted in the 2013 Georgia Evidence Code to precedent from the United States Supreme Court and United States circuit courts of appeal existing as of January 1, 2013, a position echoed by Rep. Wendell Willard (R-49th) in his remarks to the House Judiciary Committee.[111]

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107. Joyner, *supra* note 106, at 1, 5. Senator Cowsert is credited for holding the bill up twice in the Senate. *Id.* He maintains a DUI defense and insurance defense practice and has received criticism because his amendments were thought to be self-serving as they would have benefited his legal practice directly. *Id.* The proposed amendments are available at http://www.legis.ga.gov/legislation/en-US/display/31996 (follow "Senfloor amend 1AM 291055," "Senfloor amend 2AM 291054" hyperlinks).

108. Status History of HB 24, *supra* note 105. Deal served as President Pro Tempore, the second highest position in the Georgia State Senate, from 1989 to 1990 and is credited with being the former state senator "who first introduced changes to the 148-year-old evidence rules two decades ago." Kathleen Baydala Joyner, *Deal to Sign Bills at State Bar*, FULTON CNTY. DAILY REP. 1 (May 3, 2011).

109. The lag between the enactment date and the effective date, nearly a year and a half, is intended to give "everyone time to become familiar [with the changes] and go to seminars, etc. . . . ." Joyner, *supra* note 108 (quoting Rep. Willard (R-49th)).

110. Ga. H.R. Bill 24, § 1, ll. 18-24.

111. *See* Hendrix et al., *supra* note 24, at 13, 17-18.

Georgia Supreme Court precedent on statutory interpretation requires Georgia courts to consider legislative intent.[112] However, the apparent intent to adopt the interpretations of future judicial decisions handed down between the enactment of HB 24 and January 1, 2013, is curious. Even at the time of drafting this Article, the January 1, 2013 cut-off date has not passed. It would make more sense for courts and practitioners to consider whether any peculiar judicial decision handed down in the interim period was actually anticipated by the General Assembly before assigning it a precedential value. Moreover, if a court follows the stated legislative intent of HB 24, courts will be left in the unusual situation of only being required to rely on federal decisions issued before January 1, 2013, even though decisions on unsettled questions, including potential Supreme Court pronouncements on circuit splits, might be issued after January 1, 2013, and would be otherwise dispositive.[113] In one sense, the implication is that Georgia retains its sovereignty over its citizens and can interpret the new code provisions however desired so long as the interpretation is not in conflict with federal decisions issued before and through January 1, 2013. On the other hand, by permitting Georgia free interpretation, the very evils sought to be amended by adopting the Federal Rules could manifest–namely, inconsistency.[114] As a practical matter, nothing prohibits Georgia courts from looking to federal judicial decisions issued after January 1, 2013, as persuasive authority.

Further, irrespective of whether Georgia courts adhere to the legislative intent that they follow Eleventh Circuit precedent over other circuit rulings, Georgia courts will also have to decide whether, if at all, to follow federal district court decisions in the region over other circuit court decisions where the Eleventh Circuit has not yet ruled. Additional confusion could be created if parties seek to relitigate evidentiary issues

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112. *See* Cox v. Fowler, 279 Ga. 501, 502, 614 S.E.2d 59, 60 (2005) ("The rules of statutory interpretation demand that we attach significance to the Legislature's action in removing the . . . limiting language. . . . In matters of statutory construction, we look diligently for the General Assembly's intention, bearing in mind relevant old laws, evils sought to be addressed and remedies interposed.") (citations and internal quotation marks omitted).

113. The past and present sections of the Georgia Code on the qualification of expert witnesses, O.C.G.A. § 24-9-67.1 (2010) and O.C.G.A. § 24-7-702 (Supp. 2011) (effective Jan. 1, 2013), respectively, also permit courts to look to federal decisions as an aid in statutory interpretation.

114. For instance, proponents of adopting the Federal Rules of Evidence argued that commerce would be attracted as businesses would know what to expect in Georgia courts. This perceived benefit may be illusory.

after a Georgia court has ruled where the Eleventh Circuit reaches a subsequent inconsistent ruling.

III. CH-CH-CH-CHANGES: CHANGES TO THE GEORGIA EVIDENCE CODE

Georgia's adoption of considerable portions of the Federal Rules of Evidence has resulted in significant structural and substantive changes to the Georgia Evidence Code in an effort to address the concerns discussed infra.

A. Significant Structural Changes to the Georgia Evidence Code

The 2013 Georgia Evidence Code contains structural changes to the process for admitting and excluding evidence and reorganizes the Georgia Evidence Code, combining similar sections in Title 24 that were previously disbursed throughout the Georgia Code. Title 24 of the current code contains approximately 256 statutes among ten chapters, whereas in the 2013 Georgia Evidence Code, Title 24 contains approximately 208 statutes (with just two being reserved) among fourteen chapters.[115] The chapter titles and the statute numbering of the new code reflect the articles and numbering of the Federal Rules, where applicable.

The 2013 Georgia Evidence Code codifies and clarifies the common law standard that permits a trial court to exclude evidence if the prejudicial value of the evidence outweighs the substantive value.[116] Specifically, O.C.G.A. § 24-4-403[117] provides that a trial court can exclude evidence if its probative value is substantially outweighed by unfair prejudice,

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115. The 2013 Georgia Evidence Code has fourteen Chapters: Chapter 1 (General Provisions), Chapter 2 (Judicial Notice), Chapter 3 (Parol Evidence), Chapter 4 (Relevant Evidence and its Limits), Chapter 5 (Privileges), Chapter 6 (Witnesses), Chapter 7 (Opinions and Expert Testimony), Chapter 8 (Hearsay), Chapter 9 (Authentication and Identification), Chapter 10 (Best Evidence Rule), Chapter 11 (Establishment of Lost Records), Chapter 12 (Medical and Other Confidential Information), Chapter 13 (Securing Attendance of Witnesses and Production and Preservation of Evidence), and Chapter 14 (Proof Generally). As noted above, the Federal Rules are divided among eleven articles: Article 1 (General Provisions), Article II (Judicial Notice), Article III (Presumptions in Civil Actions and Proceedings), Article IV (Relevancy and Its Limits), Article V (Privileges), Article VI (Witnesses), Article VII (Opinions and Expert Testimony), Article VIII (Hearsay), Article IX (Authentication and Identification), Article X (Contents of Writings, Recordings and Photographs), and Article XI (Miscellaneous Rules).

116. *See* Jackson v. Heard, 264 Ga. App. 620, 621, 591 S.E.2d 487, 489 (2003) ("It is true that a trial judge has the discretion to exclude even relevant evidence if the judge finds that the probative value of the evidence is substantially outweighed by the risk that its admission will unduly prejudice or mislead the jury or confuse the issues being tried.").

117. O.C.G.A. § 24-4-403 (Supp. 2011) (effective Jan. 1, 2013).

confusion, or delay, except where a different evidence rule creates a different standard.[118]

Currently, the Georgia Evidence Code permits juries to determine whether confessions in criminal matters were voluntarily made after a waiver of constitutional rights.[119] O.C.G.A. § 24-1-104(c)[120] of the 2013 Georgia Evidence Code states that "[h]earings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury," removing any residuary responsibility of the jury in deciding the admissibility of evidence and leaving all questions of admissibility to the judge.[121]

By substantially adopting the Federal Rules of Evidence, the 2013 Georgia Evidence Code aggregates common rules from disparate sections of the current Georgia Code. For example, rules on authentication of evidence are presently scattered throughout the Georgia Code, including at O.C.G.A. §§ 24-7-3 through 24-7-6,[122] O.C.G.A. §§ 24-7-8 through 24-7-9,[123] O.C.G.A. §§ 24-7-20 through 24-7-21,[124] and O.C.G.A. § 24-7-24.[125] Under the 2013 Georgia Evidence Code, the rules on authentication are consolidated in O.C.G.A. §§ 24-9-901 and 902.[126]

O.C.G.A. § 24-9-901(a) explains the authentication process: "The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[127]

O.C.G.A. § 24-9-901(b) then provides "examples of authentication or identification conforming with the requirements of this Code section," but notes that the examples are "[b]y way of illustration only, and not by way of limitation."[128] Examples of what will sufficiently authenticate evidence includes testimony based on personal knowledge that evidence is authentic and evidence that a document is publicly filed.[129] Rather than listing specific means for authenticating particular types of evidence, O.C.G.A. §§ 24-9-901 and 902 provide a theoretical framework for authenticating evidence, including electronically stored information,

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118. *Id.*
119. Murray v. State, 151 Ga. App. 122, 122, 258 S.E.2d 919, 919 (1979).
120. O.C.G.A. § 24-1-104(c) (Supp. 2011) (effective Jan. 1, 2013).
121. *Id.*
122. O.C.G.A. §§ 24-7-3 to -6 (2010).
123. O.C.G.A. §§ 24-7-8 to -9 (2010).
124. O.C.G.A. §§ 24-7-20 to -21 (2010).
125. O.C.G.A. § 24-7-24 (2010); *see also* MILICH, *supra* note 5.
126. O.C.G.A. §§ 24-9-901 to -902 (Supp. 2011) (effective Jan. 1, 2013).
127. O.C.G.A. § 24-9-901(a).
128. *Id.* § 24-9-901(b).
129. *Id.* § 24-9-901(b)(1), (7).

that is not limited to specifically enumerated types of evidence, allowing greater flexibility to accommodate new types of evidence and providing multiple means for authenticating a particular piece of evidence.

B. Significant Substantive Changes to the Georgia Evidence Code

The 2013 Georgia Evidence Code contains numerous substantive changes to the rules of evidence in Georgia, including significant changes to the introduction and exclusion of hearsay evidence, the best evidence rule, the admissibility of testimony about a jury's exposure to extrajudicial information, and the admissibility of opinion-character testimony.

1. Hearsay. One of the most significant changes in the 2013 Georgia Evidence Code is that a party must now object to alleged hearsay evidence at a trial or evidentiary hearing to preserve the objection on appeal.[130] Specifically, O.C.G.A. § 24-8-802[131] provides that "if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible."[132]

Moreover, the concept of res gestae has been eliminated in favor of the English language. O.C.G.A. § 24-8-803(1), (2), and (3)[133] provide for exceptions to the exclusion of evidence as hearsay for present sense impressions, excited utterances, and statements about current mental, emotional, and physical conditions.[134] O.C.G.A. § 24-8-803(1) permits the introduction of "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter;"[135] O.C.G.A. § 24-8-803(2) allows "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;"[136] and O.C.G.A. § 24-8-803(3) allows "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health . . . ."[137]

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130. O.C.G.A. § 24-8-802 (Supp. 2011) (effective Jan. 1, 2013).
131. O.C.G.A. § 24-8-802 (Supp. 2011) (effective Jan. 1, 2013).
132. *Id.*
133. O.C.G.A. § 24-8-803(1) to -(3) (Supp. 2011) (effective Jan. 1, 2013).
134. *Id.*
135. O.C.G.A. § 24-8-803(1).
136. O.C.G.A. § 24-8-803(2).
137. O.C.G.A. § 24-8-803(3).

Previously, a party's self-serving, out-of-court statements could not be introduced into evidence.[138] Pursuant to the 2013 Georgia Evidence Code, a party's own out-of-court statements are admissible, even if self-serving, if they come within a hearsay exception and are relevant.[139] A jury can consider the self-serving nature of the statement, and such evidence "may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness."[140]

The 2013 Georgia Evidence Code now permits the introduction of business records containing opinion testimony if the business record was (1) "made at or near the time of the" opinion; (2) "made by, or from information transmitted by, a person with personal knowledge and a business duty to report;" (3) "kept in the course of a regularly conducted business activity;" and (4) "it was the regular practice of that business activity" to create the document.[141] O.C.G.A. § 24-8-803(6)[142] further provides that such information can be excluded if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."[143]

Business records are now also admissible at trial by an authenticating affidavit, rather than by in-person testimony, if the affidavit attests to the requirements of O.C.G.A. § 24-8-803(6).[144] However,

> [a] party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration.[145]

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138. Chrysler Motors Corp. v. Davis, 226 Ga. 221, 224-25, 173 S.E.2d 691, 693 (1970) (citations and internal quotation marks omitted) ("It is a general rule that self-serving declarations-that is, statements favorable to the interest of the declarant-are not admissible in evidence as proof of the facts asserted, regardless of whether they were implied by acts or conduct, were made orally, or where reduced to writing. The rule which renders self-serving statements inadmissible is the same in criminal prosecutions as in civil actions. The vital objection to the admission of this kind of evidence is its hearsay character; the phrase 'self-serving' does not describe an independent ground of objection.").

139. Milich & Ingram, *supra* note 22, at 32.

140. O.C.G.A. § 24-8-806 (Supp. 2011) (effective Jan. 1, 2013).

141. O.C.G.A. § 24-8-803(6) (Supp. 2011) (effective Jan. 1, 2013).

142. O.C.G.A. § 24-8-803(6) (Supp. 2011) (effective Jan. 1, 2013).

143. *Id.*

144. O.C.G.A. § 24-9-902(11); *see also* O.C.G.A. § 24-8-803(6).

145. O.C.G.A. § 24-9-902(11).

Under the heading of "Admissions by party-opponent," the 2013 Georgia Evidence Code broadens the standard for admitting statements by agents and coconspirators.[146] Currently, only statements by an agent that were authorized by the principal may be admitted.[147] Under the 2013 Georgia Evidence Code, O.C.G.A. § 24-8-801(d)(2)(C)[148] allows the introduction of a statement if the agent was authorized to make a statement "concerning the subject" of the statement,[149] and O.C.G.A. § 24-8-801(d)(2)(D)[150] allows the introduction of a statement by an agent "concerning a matter within the scope of the agency or employment, made during the existence of the relationship."[151]

O.C.G.A. § 24-8-801(d)(2)(E)[152] permits the introduction of "[a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy."[153] Further, "[a] conspiracy need not be charged in order to make a statement admissible under this subparagraph."[154]

If the declarant is unavailable, a prior statement against one's interests can be admitted if such a statement is "[s]upported by corroborating circumstances that clearly indicate the trustworthiness of the statement if it is offered in a criminal case as a statement that tends to expose the declarant to criminal liability."[155] Georgia courts have generally examined statements against a declarant's penal interest under the "necessity" exception to the hearsay rule to ultimately find they are unreliable and, therefore, inadmissible except when a declarant is available to testify.[156] But there is at least one Georgia case that

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146. O.C.G.A. § 24-8-801(d)(2) (Supp. 2011) (effective Jan. 1, 2013).

147. Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 371, 58 S.E. 222, 225 (1907) ("But it must first appear from the evidence that the agent is speaking within the scope of his authority, and authorized to bind the principal by his sayings, before the principal can be held bound thereby . . . .").

148. O.C.G.A. § 24-8-801(d)(2)(C).

149. *Id.*

150. O.C.G.A. § 24-8-801(d)(2)(D).

151. *Id.*

152. O.C.G.A. § 24-8-801(d)(2)(E).

153. *Id.*

154. *Id.*

155. O.C.G.A. § 24-8-804(b)(3)(B) (Supp. 2011) (effective Jan. 1, 2013).

156. *See, e.g.*, Ramsay v. State, 220 Ga. App. 618, 626, 469 S.E.2d 814, 822 (1996).

> [W]hile defendant urges that because the statements had indicia of reliability because they were against the penal interests of the declarants, this contention is contrary to the long standing position of Georgia's appellate courts that declarations, to third persons against the declarant's penal interest, to the effect that the declarant, and not the accused, was the actual perpetrator of the offense,

held declarations against penal interest were admissible as trustworthy when they were made to close family members.[157]

2. Best Evidence Rule. The 2013 Georgia Evidence Code specifically provides that a duplicate of a document may be introduced "to the same extent as an original unless: (1) [a] genuine question is raised as to the authenticity of the original; or (2) [a] circumstance exists where it would be unfair to admit the duplicate in lieu of the original."[158] Further, the 2013 Georgia Evidence Code now defines the terms "[w]riting" and "recording" to include a "magnetic impulse, or mechanical or electronic recording or other form of data compilation," providing a significant update to the current Georgia Evidence Code to account for technological changes.[159]

3. A Juror Can Testify About a Jury's Exposure to Extrajudicial Evidence. O.C.G.A. § 24-6-606(b)[160] provides that though a juror cannot testify about a jury's deliberations, "a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the juror's attention, whether any outside influence was improperly brought to bear upon any juror, or whether there was a mistake in entering the verdict onto the verdict form."[161]

> are not reliable but likely to reflect an attempt to subvert justice. Thus, such statements are inadmissible except when the declarant is available to testify.

Id.

157. *See* Jackson v. State, 288 Ga. 213, 215, 702 S.E.2d 201, 204 (2010) (finding statements against interest were admissible because the statements had "particularized guarantees of trustworthiness, including the fact that they were made to close family members and the fact that they were statements against the victim's interest inasmuch as the victim was admitting to a crime"). In evaluating whether hearsay can be admitted under Federal Rule 804(b)(3), the Eleventh Circuit employs "a three-prong test for the admission of statements against interest in criminal cases: (1) the declarant must be unavailable; (2) the statement must be against the declarant's penal interest; and (3) corroborating circumstances must clearly indicate the trustworthiness of the statement." United States v. Jernigan, 341 F.3d 1273, 1288 (11th Cir. 2003) (quoting United States v. Thomas, 62 F.3d 1332, 1337 (11th Cir. 1995)) (internal quotation marks omitted). With regard to the third prong, the Eleventh Circuit has held, "'in determining trustworthiness, the [district] court should determine what the possibility was that the declarant fabricated the statement. In other words, it must be unlikely, judging from the circumstances, that the statement was fabricated' if we are to deem the third prong of the Rule 804(b)(3) test satisfied." *Id.* (quoting United States v. Gomez, 927 F.2d 1530, 1536 (11th Cir. 1991)).

158. O.C.G.A. § 24-10-1003 (Supp. 2011) (effective Jan. 1, 2013).

159. O.C.G.A. § 24-10-1001(1) (Supp. 2011) (effective Jan. 1, 2013).

160. O.C.G.A. § 24-6-606(b) (Supp. 2011) (effective Jan. 1, 2013).

161. *Id.*

4. Character Witness Opinion Testimony is Permitted. Presently, a single individual's opinion of a person's character is inadmissible.[162] The 2013 Georgia Evidence Code O.C.G.A. § 24-4-405(a)[163] provides that "[i]n all proceedings in which evidence of character or a trait of character of a person is admissible, proof shall be made by testimony as to reputation or by testimony in the form of an opinion."[164] Similarly, O.C.G.A. § 24-6-608(a)[165] provides that the "credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation," if the evidence only refers to the "character for truthfulness or untruthfulness" and "the character of the witness for truthfulness has been attacked . . . ."[166] O.C.G.A. §§ 24-4-405[167] and 24-6-608[168] provide that character-witness testimony based on reputation is still allowed.[169]

5. Expert Witnesses. Previously, O.C.G.A. § 24-9-67.1[170] "codified the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 36 (1993), and added additional requirements for the admission of expert testimony in medical malpractice actions."[171] O.C.G.A. §§ 24-7-702 and 703,[172] with only very minor changes, repeat verbatim the language of O.C.G.A. § 24-9-67.1.

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162. Taylor v. State, 176 Ga. App. 567, 571, 336 S.E.2d 832, 836 (1985) ("Under Georgia law, the opinion of the witness as to the defendant's true character, whether he is in fact a 'good' or 'bad' person, is regarded as irrelevant when what is sought to be proved is a person's 'character.' That is because it is his reputation in the community which is regarded as best establishing what that actual and intrinsic character is and thus what *one* person (the witness) thinks of him does not show what his reputation in the community is even though that person's sole private opinion constitutes a contributing part, i.e., one vote, in the composite of personal opinions which comprise the person's standing or reputation in the community.").

163. O.C.G.A. § 24-4-405(a) (Supp. 2011) (effective Jan. 1, 2013).

164. *Id.*

165. O.C.G.A. § 24-6-608(a) (Supp. 2011) (effective Jan. 1, 2013).

166. *Id.*

167. O.C.G.A. §§ 24-4-405 (Supp. 2011) (effective Jan. 1, 2013).

168. O.C.G.A. §§ 24-6-608 (Supp. 2011) (effective Jan. 1, 2013).

169. *Id.*; O.C.G.A. § 24-4-405.

170. O.C.G.A. § 24-9-67.1 (2010).

171. 2009 Treadwell, *supra* note 64, at 145 n.78; *see also* O.C.G.A. § 24-9-67.1.

172. O.C.G.A. §§ 24-7-702 to -703 (Supp. 2011) (effective Jan. 1, 2013).

IV. REBEL REBEL: WHERE THE NEW GEORGIA RULES DEPART FROM THE FEDERAL RULES

The passage of HB 24 was an exciting development for Georgia lawyers familiar with the Federal Rules of Evidence, but it was perhaps wishful thinking to assume Georgia's version of the Federal Rules would bring clarity without confusion. While HB 24, in substance, adopted much of the Federal Rules of Evidence, Georgia has also meticulously edited almost every single rule, rewording introductory clauses, changing conjunctive phrases ("such as" becomes "including, but not limited to" for example), replacing "is" with "shall be," and so forth. It is not entirely clear that each of these changes will be held to be superficial in every circumstance.[173] As such, when faced with a significant evidentiary dispute, it would be prudent to compare the specific language of the Federal Rule and the corresponding Georgia rule. That said, it is outside the scope of this Article to discuss every instance where the redraft has changed "or" to "and/or," or something similar. Moreover, the new code has over three times as many rules as the Federal Rules of Evidence, begging the question whether attorneys will find the new code as accessible as the Federal Rules.

More significantly, according to HB 24, the General Assembly has made substantive revisions to the Federal Rules adopted in HB 24 in two main circumstances: first, where a Federal Rule has been interpreted by a significant judicial decision; and second, where a Federal Rule is perceived to be silent on a point of law where the former Georgia Evidence Code has a specific rule.[174] In the latter circumstance, the Georgia rule was often retained, as shown below. In other circumstances where the Federal Rules would have simply deferred to Georgia law, such as the rules respecting privilege, the Georgia rules were retained for obvious reasons. Below, we discuss what we perceive to be the most significant differences between the Federal Rules of Evidence and the 2013 Georgia Evidence Code.

A. *Judicial Notice*

Federal Rule 201 concerns judicial notice of facts,[175] a subject on which Georgia already has fairly specific rules, some of which it has

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173. Indeed, it makes little sense for a legislative body to waste time rewording well-known statutes if they are intended to conform exactly to their original meaning.

174. Ga. H.R. Bill 24, § 1, at ll. 19-29.

175. *See* FED. R. EVID. 201.

decided to retain.[176] For example, Georgia has an existing rule concerning judicial notice of facts contained in certified public records which does not appear in the corresponding Federal Rule.[177] Generally, in adopting Federal Rule 201, the General Assembly took a three-pronged approach. First, Federal Rule 201, concerning judicial notice of adjudicative facts, has been adopted in its entirety with a variety of apparent stylistic revisions.[178] Second, the General Assembly added O.C.G.A. § 24-2-220,[179] concerning judicial notice of matters respecting the laws and sovereignty of states and nations.[180] Third, the General Assembly added O.C.G.A. § 24-2-221,[181] concerning judicial notice of county and municipal records and laws.[182] The latter two rules are vestiges of the former Georgia Evidence Code that do not appear in the Federal Rules.[183] The overall effect is to amend Georgia's general rule regarding judicial notice of adjudicative facts to conform to Federal Rule 201 but to leave the other specific Georgia rules respecting judicial notice in place.

B. Presumptions in Civil Actions

Article III of the Federal Rules of Evidence deals with presumptions of fact in civil actions[184] and has not been adopted by the Georgia General Assembly. Federal Rule of Evidence 302 requires federal courts to follow state laws respecting presumptions of fact,[185] and there would obviously be no need for this rule in Georgia. Federal Rule of Evidence 301 more generally concerns the shifting burden of proof created by a presumption.[186] Georgia has not adopted anything analogous to Federal Rule of Evidence 301. Thus, instead, Georgia addresses particular presumptions of fact in a series of rules codified in the new O.C.G.A. §§ 24-14-20 through 24-14-29.[187] Respecting the shifting burden of proof, Georgia's new rules of evidence are mostly silent,

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176. *See* O.C.G.A. §§ 24-7-20 to -27 (2010).
177. O.C.G.A. § 24-7-20.
178. O.C.G.A. § 24-2-201 (Supp. 2011) (effective Jan. 1, 2013).
179. O.C.G.A. § 24-2-220 (Supp. 2011) (effective Jan. 1, 2013).
180. *Id.*
181. O.C.G.A. § 24-2-221 (Supp. 2011) (effective Jan. 1, 2013).
182. *Id.*
183. For example, compare the 2013 Georgia Evidence Code's O.C.G.A. § 24-2-220 with O.C.G.A. § 24-1-4 (2010).
184. *See* FED. R. EVID. 301, 302.
185. FED. R. EVID. 302.
186. FED. R. EVID. 301.
187. *See* O.C.G.A. §§ 24-14-20 to -29 (Supp. 2011) (effective Jan. 1, 2013).

indicating only that certain presumptions "may be rebutted by proof"[188] and that the determination of whether a presumption has been rebutted "shall be exclusively questions for the jury, to be decided by the ordinary test of human experience."[189] Thus, instead of adopting the more general Federal Rule, Georgia has apparently chosen to rely on its common law. This is confusing because, in *Miller v. Miller*,[190] the Georgia Supreme Court fashioned the common law by specific reference to Federal Rule 301.[191] In *Miller*, the Georgia Supreme Court noted that the rules respecting presumptions are confusing and concluded that Georgia law is clarified by Federal Rule 301, although Federal Rule 301 had not been expressly adopted in Georgia.[192]

Additional confusion is perhaps created because Federal Rule 301 is scheduled to be amended on December 1, 2011,[193] and it is not clear how this amendment will affect the *Miller* decision. Currently, Federal Rule 301 states:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.[194]

Absent contrary congressional action, this rule will be amended as of December 1, 2011, to read:

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188. O.C.G.A. § 24-14-21.

189. O.C.G.A. § 24-14-20.

190. 258 Ga. 168, 366 S.E.2d 682 (1988).

191. *Id.* at 169-70, 366 S.E.2d at 683. In *Miller*, the Georgia Supreme Court held:

> Concerning the effect of a presumption on the burden of proof, the rule, generally, is that while a presumption operating in favor of the party having the ultimate burden of persuasion requires the opposing party to go forward with evidence rebutting the presumption, it does not shift the original burden of persuasion. That burden remains with the party upon whom it was originally cast. Language in cases such as *Wilkins v. Department of Human Resources*, 255 Ga. 230, 234, 337 S.E.2d 20 (1985) and *Morgan v. State*, 172 Ga. App. 375, 376, 323 S.E.2d 620 (1984), relied upon by the wife, must be read with this principle in mind. While this principle has not been expressly adopted in this state, by statute or otherwise, we find no conflict between it and any of our statutes or case law.

Id. (footnotes omitted).

192. 258 Ga. at 170, 366 S.E.2d at 683.

193. *See* FED. R. EVID. 301; *see also* Pending Rules Amendments, ADMINISTRATIVE OFFICE OF THE U.S. COURTS (Aug. 2009), http://www.uscourts.gov/rulesandpolicies/federalrulemaking/pendingrules.aspx.

194. FED. R. EVID. 301.

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.[195]

According to the Advisory Committee, the Federal Rule is intended to shift the burden of proof as to a specific fact, but not the overall burden of proof or persuasion for a cause of action.[196] In Georgia, prudence suggests looking to the *Miller* decision for a statement of policy. Nonetheless, it seems important to carefully inspect Georgia's common law, as well as the plain language of Georgia's rules respecting specific presumptions of fact, in situations where presumptions become important. For whatever reason, it appears the General Assembly did not share the Georgia Supreme Court's desire to adopt Federal Rule 301.

C. Parol Evidence

In place of Article III of the Federal Rules concerning presumptions and burdens of proof, the 2013 Georgia Evidence Code contains Chapter 3, O.C.G.A. §§ 24-3-1 through 24-3-10,[197] which is a codification of Georgia's parol evidence rule.[198] A substantive discussion of Georgia's parol evidence rule is outside the scope of this Article, but it is worth noting that the rule can now be found in the new rules of evidence.

D. Relevance

1. Character Evidence – Crimes, Wrongs, and Acts. A majority of Article IV of the Federal Rules concerning relevance and its limits has been adopted by Georgia,[199] but a few possibly significant changes should be noted. First, Federal Rule 404(b) concerns the use of evidence of a person's crimes, wrongs, or acts to prove their character and to prove action in conformity therewith.[200] Both the Federal Rule and its Georgia analog, new O.C.G.A. § 24-2-404(b),[201] make this "bad act"

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195. *See* Pending Rules Amendments, *supra* note 192 (follow "Amendments Approved by Supreme Court" hyperlink; then follow "Excerpt on the Report of the Advisory Committee on Evidence Rules" hyperlink).

196. *Id.*

197. O.C.G.A. §§ 24-3-1 to -10 (Supp. 2011) (effective Jan. 1, 2013).

198. *See id.*

199. *See generally* O.C.G.A. §§ 24-4-401 to -417 (Supp. 2011) (effective Jan. 1, 2013).

200. FED. R. EVID. 404(b).

201. O.C.G.A. § 24-2-404(b) (Supp. 2011) (effective Jan. 1, 2013).

character evidence generally inadmissible, and both enumerate certain circumstances as exceptions in which the evidence may be admitted.[202]

In criminal prosecutions, both rules generally require–upon reasonable request–advance notice from the prosecution to the accused of its intent to use "bad act" evidence.[203] The new Georgia rule, however, contains an additional sentence to identify circumstances under which the prosecution does not need to provide this advance notice.[204]

Specifically, the Federal Rule states, in relevant part: "[U]pon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."[205] The corollary Georgia rule states as follows, with the differences in bold text:

> The prosecution in a criminal proceeding shall provide reasonable notice to the defense in advance of trial, **[deleted "or during trial"]** unless pretrial notice is excused by the court upon good cause shown, of the general nature of any such evidence it intends to introduce at trial. **Notice shall not be required when the evidence of prior crimes, wrongs, or acts is offered to prove the circumstances immediately surrounding the charged crime, motive, or prior difficulties between the accused and the alleged victim.**[206]

Additionally, if pretrial notice is excused by the judge, the Georgia rule, unlike the Federal Rule, does not appear to require reasonable "during trial" notice of intent to use character evidence.[207] Also, Georgia's rule excuses notice in circumstances where the character evidence "is offered to prove the circumstances immediately surrounding the charged crime, motive, or prior difficulties between the accused and the alleged victim."[208] This distinction appears to be consistent with existing Georgia case law, which holds that evidence of motive, circumstances immediately surrounding the crime, and prior difficulties between the accused and the victim are relevant and admissible, even if they incidentally place the accused's character at issue.[209]

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202. *Compare* FED. R. EVID. 404(b), *with* O.C.G.A. 24-4-404(b).
203. *See* FED. R. EVID. 404(b); O.C.G.A. § 24-4-404(b).
204. *See* O.C.G.A. § 24-4-404(b).
205. FED. R. EVID. 404(b).
206. O.C.G.A. § 24-4-404(b).
207. *Compare* FED. R. EVID. 404(b), *with* O.C.G.A. § 24-4-404(b).
208. O.C.G.A. 24-4-404(b).
209. *See*, *e.g.*, Cawthon v. State, 289 Ga. 507, 508 n.2, 713 S.E.2d 388, 391 n.2 (2011) (noting character evidence was relevant to the accused's "motive for the attack, and thus was not rendered inadmissible merely by incidentally placing his character in issue"); Shields v. State, 203 Ga. App. 538, 539, 417 S.E.2d 168, 169 (1992) (holding state may

2. Subsequent Remedial Measures. Federal Rule 407 concerns the general inadmissibility of "subsequent remedial measures" to prove liability and the exceptions to this rule.[210] Georgia has adopted the rule in new O.C.G.A. § 24-4-407,[211] with one main difference.[212] The new Georgia rule allows evidence of subsequent remedial measures to prove product liability,[213] whereas the Federal Rule explicitly does not.[214] All other modifications to Federal Rule 407 as adopted in Georgia appear to be stylistic, such as the substitution of "including, but not limited to" in place of "such as" in the final sentence.[215]

3. Offers to Compromise. Federal Rule 408 concerns the general admissibility of offers of settlement and compromise,[216] and the new Georgia rule, O.C.G.A. § 24-4-408,[217] is different enough that care should be taken to distinguish the two.[218] Specifically, Federal Rule 408 states as follows:

> (a) Prohibited uses. – Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
> (1) furnishing or offering or promising to furnish–or accepting or offering or promising to accept–a valuable consideration in compromising or attempting to compromise the claim; and

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inform jurors of all circumstances surrounding the commission of a crime, even if that information incidentally places a defendant's character into issue); Lance v. State, 275 Ga. 11, 19, 560 S.E.2d 663, 674 (2002) ("The evidence of similar transactions and prior difficulties admitted by the trial court did not impermissibly place [the defendant's] character at issue.").

210. FED. R. EVID. 407.

211. O.C.G.A. § 24-4-407 (Supp. 2011) (effective Jan. 1, 2013).

212. *See id.*

213. *Id.*

214. FED. R. EVID. 407 ("evidence of the subsequent measures is not admissible to prove . . . a defect in a product, a defect in a product's design, or a need for a warning or instruction").

215. *Compare* FED. R. EVID. 407 ("This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."), *with* O.C.G.A. § 24-4-407 ("The provisions of this Code section shall not require the exclusion of evidence of remedial measures when offered for impeachment or for another purpose, including, but not limited to, proving ownership, control, or feasibility of precautionary measures, if controverted.").

216. FED. R. EVID. 408.

217. O.C.G.A. § 24-4-408 (Supp. 2011) (effective Jan. 1, 2013).

218. *Compare id.*, *with* FED. R. EVID. 408.

> (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.
> (b) Permitted uses. – This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.[219]

By contrast, the new Georgia rule states as follows:

> (a) Except as provided in Code Section 9-11-68, evidence of:
> (1) Furnishing, offering, or promising to furnish; or
> (2) Accepting, offering, or promising to accept
> a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount shall not be admissible to prove liability for or invalidity of any claim or its amount.
> (b) Evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible.
> (c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section shall not require exclusion of evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution.[220]

Traditionally, Georgia attorneys have understood that certain subtle differences between the federal and Georgia rules respecting settlement and compromise negotiations have required careful wording in settlement communications to accommodate both sets of rules. For example, in Georgia state courts, an offer to settle will be admissible unless it contains an offer to "compromise," in which case it becomes inadmissible.[221] Under the Federal Rules, the Eleventh Circuit holds that offers of "settlements" and "settlement negotiations" are generally inadmissible.[222] Thus, to protect one's settlement communication from admission into evidence in state court, an offer had to be styled and presented as an "offer to compromise," whereas a mere "offer to settle" was most

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219. FED. R. EVID. 408.

220. O.C.G.A. § 24-4-408.

221. Trickett v. Advanced Neuromodulation Sys., Inc., 542 F. Supp. 2d 1338, 1353 (S.D. Ga. 2008) (applying Georgia law).

222. Lampliter Dinner Theater, Inc. v. Liberty Mut. Ins. Co., 792 F.2d 1036, 1042 (11th Cir. 1986) ("Well established case law and the Federal Rules of Evidence prohibit the introduction of settlements or settlement negotiations into evidence to prove liability.").

likely inadmissible in federal court. If HB 24 was an attempt to alleviate this federal/state distinction, the wording of the new Georgia rule does not clearly demonstrate this intent.

4. Expressions of Benevolence in Medical Malpractice Cases. The Federal Rules do not appear to have an analog of Georgia's O.C.G.A. § 24-4-416,[223] which is a re-codification of a tort reform statute that makes "any and all statements, affirmations, gestures, activities, or conduct expressing regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence" inadmissible to prove liability in a medical malpractice case.[224]

5. Admissibility of Prior Drunk Driving Incidents. The Federal Rules do not have an analog of Georgia's new O.C.G.A. § 24-4-417,[225] which, as noted above, concerns the admissibility of prior instances of drunk driving[226] in prosecutions for violation of O.C.G.A. § 40-6-391.[227]

E. Privileges

For obvious reasons, the Georgia Rules of Evidence depart from the Federal Rules respecting privilege.[228] In federal question and criminal cases, the Federal Rules direct the federal courts to apply federal common law privilege rules.[229] In diversity jurisdiction cases, federal courts apply state law privilege rules.[230] Georgia has no need to adopt the Federal Rule on this point because Georgia has already codified its own privilege rules and has no need to adopt the federal common law. Accordingly, instead of adopting Article V of the Federal Rules, Chapter

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223. O.C.G.A. § 24-4-416 (Supp. 2011) (effective Jan. 1, 2013).
224. *Id.*
225. O.C.G.A. § 24-4-417 (Supp. 2011) (effective Jan. 1, 2013).
226. O.C.G.A. § 24-4-417.
227. O.C.G.A. § 40-6-391 (2011).
228. *Compare* O.C.G.A. §§ 24-5-501 to -508 (Supp. 2011) (effective Jan. 1, 2013), *with* FED. R. EVID. 501, 502.
229. FED. R. EVID. 501 ("[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.").
230. *Id.* ("[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.").

5 of the new Georgia rules, O.C.G.A. §§ 24-5-501 through 24-5-508,[231] codifies Georgia's rules respecting privilege.[232]

One curiosity found in the new Georgia privilege rules relates to the clergy/practitioner privilege found in new O.C.G.A. § 24-5-502.[233] Notably, this rule is a revised version of existing O.C.G.A. § 24-9-22,[234] effective until January 1, 2013, and it enumerates a list of religious faiths that are entitled to a clergy/practitioner privilege if the practitioner professes faith in the clergyman's religion.[235] The list omits several major religions, including Mormonism and Islam.[236] Interestingly, the General Assembly went so far as to revise the words "Jewish rabbi" in the existing rule to "Jewish minister or similar functionary" in the new rule, but there is no indication that the General Assembly considered updating the rule to be more inclusive generally.[237] It is odd that the legislators would have bothered with amending this language without considering a broader amendment, taking into consideration recent federal court decisions concerning state preference of one religious denomination over another.[238] One wonders whether

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231. O.C.G.A. §§ 24-5-501 to -508.

232. *Id.*

233. O.C.G.A. § 24-5-502.

234. O.C.G.A. § 24-9-22 (2010).

235. *Compare* O.C.G.A. § 24-9-22 (2010) ("Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called, shall be deemed privileged. No such minister, priest, or rabbi shall disclose any communications made to him by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, or rabbi be competent or compellable to testify with reference to any such communication in any court."), *with* new O.C.G.A. § 24-5-502 ("Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or any Christian or Jewish minister or similar functionary, by whatever name called, shall be deemed privileged. No such minister, priest, rabbi, or similar functionary shall disclose any communications made to him or her by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, rabbi, or similar functionary be competent or compellable to testify with reference to any such communication in any court.").

236. *See id.*

237. *Id.*

238. *See* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion. . . ."); Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514, 1542 (11th Cir. 1993) (citation and internal quotation marks omitted) (explaining how the First Amendment's "prohibition of denominational preferences is inextricably connected with the continuing vitality of" the freedom of religion).

this rule would withstand a challenge based on the Establishment Clause of the First Amendment to the United States Constitution.[239]

F. Witnesses and Competency

The first half of Article VI of the Federal Rules and Chapter 6 of the new Georgia rules generally concern witnesses, oaths, and competency.[240] Generally, the Federal Rules have been adopted by Georgia, but there are a few minor differences that should be noted.

Under both sets of rules, a party is generally incompetent to testify to a fact about which he lacks personal knowledge, but Georgia has carved out an exception such that a party is competent to make an admission regardless of whether a foundation for personal knowledge has been laid.[241] Greater care may therefore be required in Georgia courts where a party could, theoretically, admit a damaging fact although he lacks actual knowledge of the fact.

Regarding oaths and affirmations, Georgia has added provisions that do not appear in the Federal Rules with respect to children and oaths to be applied in child deprivation proceedings.[242] Finally, language interpreters in Georgia are subject to slightly different rules than they would be under Federal Rule 604.[243]

1. Evidence of Character and Impeachment. Georgia's new character and impeachment rules are largely uniform with the corresponding Federal Rules,[244] with a few notable exceptions. Federal Rule 608, concerning character and conduct of witnesses,[245] has been adopted by Georgia, with the addition of the Georgia rule that extrinsic evidence of the conduct of a witness is admissible to attack his or her character for truthfulness if it tends to show bias toward a party.[246]

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239. U.S. CONST. amend. I.

240. *Compare* O.C.G.A. §§ 24-6-601 to -606 (Supp. 2011) (effective Jan. 1, 2013), *with* FED. R. EVID. 601 to 606.

241. *Compare* FED. R. EVID. 602, *with* O.C.G.A. § 24-6-602.

242. *See* O.C.G.A. § 24-6-603(b).

243. *Compare* FED. R. EVID. 604, *with* O.C.G.A. § 24-6-604.

244. This is not a significant departure from existing Georgia law, as Georgia courts have looked to federal case precedent for clarification of Georgia's impeachment rules in the past. *See*, *e.g.*, Thomas v. State, 291 Ga. App. 795, 800, 662 S.E.2d 849, 854 (2008) (examining former Fifth Circuit precedent in connection with Federal Rule 609 in association with Georgia impeachment rules); *see also* 2009 Treadwell, *supra* note 64.

245. FED. R. EVID. 608.

246. O.C.G.A. § 24-6-608(b) (Supp. 2011) (effective Jan. 1, 2013); Hendrix et al., *supra* note 24, at 18.

This exception is not specifically included in the Federal Rule, but has been recognized by the Eleventh Circuit.[247]

Federal Rule 609(c),[248] as adopted and modified in Georgia, adds "[e]vidence of a final adjudication of guilt and subsequent discharge under any first offender statute" to the list of criminal convictions that cannot be admitted to impeach a witness.[249] The Federal Rule only bars admission of convictions which had been "the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted . . . ."[250] The General Assembly must have believed that discharge under a first-offender statute did not obviously fall within the "other equivalent procedure" language of the Federal Rule.

Federal Rule 609(d) generally makes juvenile convictions inadmissible to impeach a witness.[251] The Georgia version of this rule adds nolo contendere pleas.[252]

2. Mode of Order of Witness Interrogation. Federal Rule 611 and the corresponding Georgia rule generally concern the mode and order of witness interrogation and presentation.[253] Georgia's new rule demonstrates a significant diversion from the plain text of the Federal Rule respecting both the scope of cross-examination and the amount of discretion vested in the trial court to either permit leading questions on direct examination or forbid them on cross-examination.[254] On the first point, the Georgia rule completely rejects the concept featured in the Federal Rule that the scope of cross-examination should be limited to "the subject matter of the direct examination and matters affecting the credibility of the witness,"[255] and instead permits every party to make a "thorough and sifting cross-examination" on topics including "any matter relevant to any issue in the proceeding."[256] On the second point, the Georgia rule states that "[l]eading questions shall not be used

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247. *See* FED. R. EVID. 608(b); *cf.* United States v. Corbin, 734 F.3d 643, 655 (11th Cir. 1984) (upholding exclusion of extrinsic act evidence under Federal Rule of Evidence 608 unless the act tends to show bias toward a party).

248. FED. R. EVID. 609(c).

249. O.C.G.A. § 24-6-609(c) (Supp. 2011) (effective Jan. 1, 2013).

250. *See* FED. R. EVID. 609(c)(1).

251. FED. R. EVID. 609(d).

252. O.C.G.A. § 24-6-609(d) (Supp. 2011) (effective Jan. 1, 2013).

253. *Compare* FED. R. EVID. 611, *with* new O.C.G.A. § 24-6-611 (Supp. 2011) (effective Jan. 1, 2013).

254. *Compare* FED. R. EVID. 611, *with* new O.C.G.A. § 24-6-611.

255. FED. R. EVID. 611(b).

256. O.C.G.A. § 24-6-611(b).

on the direct examination of a witness" and that "[o]rdinarily leading questions shall be permitted on cross-examination."[257] In both sentences, the Georgia rule replaces the word "should" with "shall," reflecting an apparent intent to limit the trial court's discretion in this regard.[258]

3. Writings Used to Refresh Recollection. Federal Rule 612 and its analog in the new Georgia rules concern the use of writings to refresh the recollection of a witness.[259] Georgia has, for the most part, adopted the Federal Rule, albeit with a large degree of stylistic revision that makes the Georgia rule appear substantially longer than the Federal Rule.[260] The main substantive departure from the text of the Federal Rule concerns the use of writings that are subject to attorney-client privilege to refresh the recollection of a witness before trial. Specifically, if the court orders the writing produced to the opposing party, the new Georgia rule contains a provision stating that this production does not constitute a waiver of the privilege.[261]

4. Prior Inconsistent and Consistent Statements. Federal Rule 613 concerns circumstances in which a witness's prior inconsistent statements may be used to impeach him or her.[262] Georgia has, with minor stylistic revisions, adopted the Federal Rule but has added O.C.G.A. § 24-6-613(c), respecting the admissibility of prior consistent statements to be used for witness rehabilitation.[263]

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257. *Id.* § 24-6-611(c).

258. *Id.*

259. *Compare* FED. R. EVID. 612, *with* O.C.G.A. § 24-6-612 (Supp. 2011) (effective Jan. 1, 2013).

260. *Id.*

261. *See* O.C.G.A. § 24-6-612(b) ("If the writing used is protected by the attorney-client privilege or as attorney work product under Code Section 9-11-26, use of the writing to refresh recollection prior to the trial shall not constitute a waiver of that privilege or protection.").

262. FED. R. EVID. 613.

263. O.C.G.A. § 24-6-613(c) (Supp. 2011) (effective Jan. 1, 2013).

> A prior consistent statement shall be admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack made on the witness's credibility. A general attack on a witness's credibility with evidence offered under Code Section 24-6-608 or 24-6-609 shall not permit rehabilitation under this subsection. If a prior consistent statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, the prior consistent statement shall have been made before the alleged recent fabrication or improper influence or motive arose.

Id.

5. Witnesses Called by the Court. Federal Rule 614 generally concerns a trial court's discretion to call witnesses either on its own motion or at the suggestion of a party.[264] The new Georgia rules of evidence adopt a very restricted version of the rule, which appears to reflect a preference for less court involvement in the presentation of testimony.[265] Specifically, the Federal Rule allows the trial court to call "witnesses" of any variety, whereas the Georgia rule restricts the trial court's ability to call witnesses without the consent of all parties to three categories: (a) court appointed experts; (b) witnesses regarding the competency of any party; or (c) child witnesses.[266]

6. Exclusion of Witnesses. Federal Rule 615, and its analog in the new Georgia rules of evidence, concern the trial court's duty and discretion–and the limits thereof–to exclude witnesses from hearing the testimony of other witnesses.[267] The new Georgia rule is, for the most part, identical to the Federal Rule, except that in place of the Federal Rule's catch-all exception that prohibits the court from excluding "a person authorized by statute to be present,"[268] Georgia has substituted O.C.G.A. § 24-6-616,[269] which prohibits the court from excluding a victim of a crime from observing the trial.[270] This is partially consistent with federal law, which, through the Crime Victims Rights Act[271] and the Victim Rights Clarification Act of 1997,[272] prohibits federal trial courts from excluding victims of crime from observing the testimony of other witnesses,[273] although the federal statutes contain exceptions where the trial court believes the victim's own testimony would be "materially altered" by observing the testimony of other witnesses.[274]

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264. FED. R. EVID. 614.

265. *See* O.C.G.A. § 24-6-614 (Supp. 2011) (effective Jan. 1, 2013).

266. O.C.G.A. § 24-6-614(a).

267. *Compare* FED. R. EVID. 615, *with* O.C.G.A. §§ 24-6-615 to -616 (Supp. 2011) (effective Jan. 1, 2013).

268. FED. R. EVID. 615(4).

269. O.C.G.A. § 24-6-616.

270. *Id.*; *compare* O.C.G.A. § 24-6-616, *with* O.C.G.A. § 24-6-615.

271. 18 U.S.C. § 3771 (2006 & Supp. III 2010).

272. 18 U.S.C. § 3510 (2006).

273. *Id.*; 18 U.S.C. § 3771(a)(3).

274. *See* 18 U.S.C. § 3771(a)(3) (a victim of a crime has "[t]he right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding"); 18 U.S.C. § 3510 (victim cannot be excluded simply because observation of other witness testimony may prejudice his victim impact statement during sentencing); United States v. McVeigh, 958 F. Supp. 512,

Georgia's new rules appear to omit this exception, opting instead to favor the victim's right to observe the proceedings.[275]

7. Miscellaneous Rules Concerning Witnesses. It should be noted that Georgia has adopted several rules in Chapter 6 which are not present in the Federal Rules, including O.C.G.A. §§ 24-6-620 through 24-6-623.[276] These rules cover topics including the trier of fact's role in determining the credibility of witnesses,[277] impeachment by disproving a witness's testimony,[278] the relevance of a witness's feelings toward or relationship to a party,[279] and the state's obligation to be pleasant to a witness when examining him.[280]

8. Georgia Rules Regarding the Hearing Impaired. Georgia has a significant policy "to secure the rights of hearing impaired persons . . . ."[281] Accordingly, rules respecting the conduct of proceedings involving a hearing impaired individual are codified in the new Georgia evidence rules at O.C.G.A. §§ 24-6-650 through 24-6-658.[282]

G. Opinion/Expert Testimony

Georgia has, for the most part, adopted the Federal Rules regarding opinions and expert testimony.[283]

1. Opinion Testimony Concerning Value of Property. With specific respect to market value testimony, the new Georgia evidence rules add a section to Federal Rule 701,[284] permitting a party to testify to his or her opinion of the market value of an article of property "if he or she has had an opportunity to form a reasoned opinion."[285] This is

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514-15 (D. Colo. 1997) (court may voir dire victim witnesses outside the presence of the jury prior to delivery of their victim impact statements to detect and exclude testimony that has been prejudiced by observation of the trial).

275. *See* O.C.G.A. § 24-6-616.

276. O.C.G.A. §§ 24-6-620 to -623 (Supp. 2011) (effective Jan. 1, 2013).

277. O.C.G.A. § 24-6-620.

278. O.C.G.A. § 24-6-621.

279. O.C.G.A. § 24-6-622.

280. O.C.G.A. § 24-6-623.

281. O.C.G.A. § 24-6-650 (Supp. 2011) (effective Jan. 1, 2013).

282. O.C.G.A. §§ 24-6-650 to -658 (Supp. 2011) (effective Jan. 1, 2013). A full discussion of these sections is outside the scope of this Article, but prudence suggests reviewing these rules prior to conducting superior or state court cases involving a hearing impaired person.

283. *See* O.C.G.A. §§ 24-7-701 to -707 (Supp. 2011) (effective Jan. 1, 2013).

284. FED. R. EVID. 701.

285. O.C.G.A. § 24-7-701(b) ("A witness need not be an expert or dealer in an article or property to testify as to its value if he or she has had an opportunity to form a reasoned

a re-codification of Georgia's current code section: O.C.G.A. § 24-9-66.[286]

2. Expert Opinion Testimony. The plain text of the new O.C.G.A. § 24-7-702[287] is drastically different and longer than Federal Rule 702,[288] regarding the testimony of experts.[289] However, the difference mostly concerns: (a) Georgia's requirement that an expert witness testifying to a standard of care in a professional malpractice case be appropriately credentialed;[290] and (b) Georgia's codification of the federal case law found in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[291] and its progeny.[292]

3. Expert Testimony in Criminal Proceedings. In addition to the other Federal Rules respecting expert testimony, Georgia has added O.C.G.A. § 24-7-707,[293] which states that "[i]n criminal proceedings, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses,"[294] which recodifies current law found at O.C.G.A. § 24-9-67.[295]

H. Hearsay

1. Definitions. Georgia's new Rule of Evidence O.C.G.A. § 24-8-801,[296] containing hearsay definitions, generally tracks the form and

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opinion.").

286. *See* O.C.G.A. § 24-9-66 (2010); *see also* Dep't of Transp. v. Se. Timberlands, Inc., 263 Ga. App. 805, 810, 589 S.E.2d 575, 581 (2003) (citation and internal quotation marks omitted) ("The question of whether a witness has established sufficient opportunity for forming a correct opinion or has stated a proper basis for expressing an opinion is for the trial court" and is reviewed by the court of appeals "for abuse of discretion.").

287. O.C.G.A. § 24-7-702.

288. FED. R. EVID. 702.

289. *Compare* O.C.G.A. § 24-7-702, *with* FED. R. EVID. 702.

290. *See* O.C.G.A. § 24-7-702(c).

291. 509 U.S. 579 (1993).

292. *See* O.C.G.A. § 24-7-702(f) ("[I]n interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.").

293. O.C.G.A. § 24-7-707.

294. *Id.*

295. O.C.G.A. § 24-9-67 (2010).

296. O.C.G.A. § 24-8-801 (Supp. 2011) (effective Jan. 1, 2013).

substance of the corresponding Federal Rule 801.[297] The new rule adds definitions of "public official" and "public record" at the end of the rule,[298] but the remainder of the rule mirrors its federal counterpart with the exception of the two diversions discussed below.

Federal Rule 801(d)(1) and O.C.G.A. § 24-8-801(d)(1) are similar provisions that establish rules for using a witness's prior statements to impeach or rehabilitate his credibility.[299] As shown below, however, Georgia's rule makes a significant departure to address the use of prior statements to attack or bolster the credibility of a non-witness whose out-of-court hearsay statement has (for whatever reason) been admitted and heard by the jury.[300]

Under the Federal Rule, a witness's prior statement only qualifies as nonhearsay if the declarant is available to testify and be cross-examined about the prior statement at trial.[301] This makes sense, as the Federal Rule assumes the out-of-court statement is being used to impeach or rehabilitate a witness at trial.[302] For example, Federal Rule of Evidence 801(d)(1)(A) allows a witness to be impeached on cross-examination by his prior inconsistent testimony.[303]

The Georgia rule generally covers the same ground, although Georgia has compressed Federal Rules of Evidence 801(d)(1)(A) and (B) into a single section, O.C.G.A. § 24-8-801(d)(1)(A).[304] In addition, Georgia has included O.C.G.A. § 24-8-801(d)(1)(B) to account for circumstances where a party wants to attack the credibility of a non-witness hearsay declarant who has not testified or been made available for cross-examination.[305] In relevant part, the new Georgia rule states:

> If a hearsay statement is admitted and the declarant does not testify at the trial or hearing, other out-of-court statements of the declarant shall be admissible for the limited use of impeaching or rehabilitating the credibility of the declarant, and not as substantive evidence, if the other statements qualify as prior inconsistent statements or prior consistent statements under [O.C.G.A. §] 24-6-613.[306]

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297. *Compare* FED. R. EVID. 801, *with* O.C.G.A. § 24-8-801.
298. O.C.G.A. § 24-8-801(f) to (g).
299. *Compare* FED. R. EVID. 801(d)(1), *with* O.C.G.A. § 24-8-801(d)(1).
300. *See* O.C.G.A. § 24-8-801(d)(1)(B).
301. FED. R. EVID. 801(d)(1).
302. *See id.*
303. FED. R. EVID. 801(d)(1)(A).
304. *Compare* FED. R. EVID. 801(d)(1)(A)-(B), *with* O.C.G.A. § 24-8-801(d)(1)(A).
305. O.C.G.A. § 24-8-801(d)(1)(B).
306. *Id.*

Under this rule, which is similar to, but not as extensive as Federal Rule of Evidence 806, the court is directed to admit other out-of-court statements from the same hearsay declarant to impeach or rehabilitate his or her credibility as long as, pursuant to O.C.G.A. § 24-6-613,[307] they qualify as prior inconsistent or consistent statements.[308]

Under both the Federal Rule and the new Georgia rule, a party's own statements are admissible against him as admissions, and are not hearsay.[309] Under both rules, an admission made by a party's agent is generally binding and admissible against the party.[310] However, Georgia creates an exception to this rule for statements made by "any agent of the state in a criminal proceeding."[311]

2. Hearsay Admissibility. Respecting the admissibility of hearsay, the Federal and Georgia rules are, on their face, fairly different.[312] Specifically, Federal Rule 802 states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."[313] New O.C.G.A. § 24-8-802 states: "Hearsay shall not be admissible except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible."[314] Notably, the Georgia rule has eliminated the clause from the Federal Rule that would have extended to the Georgia Supreme Court the authority to supplement the statutory rules of evidence.[315] Further, and as noted above, Georgia has added a provision to O.C.G.A. § 24-8-802[316] explicitly stating that hearsay becomes legal and admissible evidence if a party

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307. *Id.* § 24-6-613.

308. *Id.* § 24-8-801(d)(1)(B); FED. R. EVID. 806; *see also* Brantley v. State, 177 Ga. App. 13, 16-17, 338 S.E.2d 694, 698 (1985) (recognizing the right to impeach hearsay declarants with prior inconsistent testimony in Georgia, consistent with FED. R. EVID. 806).

309. *Compare* FED. R. EVID. 801(d)(2), *with* O.C.G.A. § 24-8-801(d)(2).

310. *Compare* FED. R. EVID. 801(d)(2)(D), *with* O.C.G.A. § 24-8-801(d)(2)(D).

311. O.C.G.A. § 24-8-801(d)(2)(D).

312. *Compare* FED. R. EVID. 802, *with* O.C.G.A. § 24-8-802 (Supp. 2011) (effective Jan. 1, 2013).

313. FED. R. EVID. 802.

314. O.C.G.A. § 24-8-802.

315. *See* O.C.G.A. § 24-8-802.

316. O.C.G.A. § 24-8-802 (Supp. 2011) (effective Jan. 1, 2013).

fails to make a proper objection.[317] While this provision does not appear in the Federal Rule, federal precedent recognizes it.[318]

3. Declarant Available. With the exception of a large number of apparent stylistic revisions,[319] and a smaller number of minor revisions focused on modernizing the rule to include reference to electronic records,[320] Georgia has adopted Federal Rule 803 regarding exceptions to the rule excluding hearsay when the declarant's availability is immaterial.[321] The most extensive revisions appear to have been made to O.C.G.A. § 24-8-803(6),[322] regarding admissibility of business records, but even these rather drastic revisions appear to be either stylistic or the codification of judicial decisions interpreting the existing rule. In the most obvious revision, an entire new final sentence has been added to Georgia's version of Federal Rule 803(6), which states: "Public records and reports shall be admissible under paragraph (8) of this Code section and shall not be admissible under this paragraph."[323] This, however, merely codifies Eleventh Circuit precedent holding that Federal Rule 803(6), regarding business records, "cannot be used as a 'back door' to introduce evidence that would not be admissible under Rule 803(8)(B)."[324] Thus, there appears to be no practical difference between Federal Rule 803 and the new Georgia O.C.G.A. § 24-8-803,[325] but the large number of "stylistic" changes to this rule could also be viewed as an opportunity to argue that the General Assembly intended to give the rule a different meaning.

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317. *Id.*; *see also* Smith v. State, 123 Ga. App. 269, 270-73, 180 S.E.2d 556, 558-59.

318. *See, e.g.,* United States v. Hamilton, 694 F.2d 398, 401 (5th Cir. 1982) (citation omitted) ("Whether or not the above second-hand admission might properly have come in under an exception to the hearsay rule we shall never know, since no objection was levelled at it. This being so, it is settled law in our circuit that '[w]here there is no objection to hearsay the jury may consider it for whatever value it may have.'").

319. *Compare*, *e.g.*, O.C.G.A. § 24-8-803(11) (Supp. 2011) (effective Jan. 1, 2013) ("[s]tatements of birth"), *with* FED. R. EVID. 803(11) ("[s]tatements of births").

320. *See* O.C.G.A. § 24-8-803(18) (Supp. 2011) (effective Jan. 1, 2013) (emphasis added) ("To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, *whether published electronically or in print*. . . .").

321. *Compare* O.C.G.A. § 24-8-803 (Supp. 2011) (effective Jan. 1, 2013), *with* FED. R. EVID. 803.

322. O.C.G.A. § 24-8-803(6).

323. *Compare* O.C.G.A. § 24-8-803(6), *with* FED. R. EVID. 803(6).

324. United States v. Brown, 9 F.3d 907, 911 (11th Cir. 1993); *see also* United States v. Oates, 560 F.2d 45, 68 (2d Cir. 1977).

325. O.C.G.A. § 24-8-803 (Supp. 2011) (effective Jan. 1, 2013).

4. Declarant Unavailable. Georgia has, with the exception of a large number of apparent stylistic revisions, adopted Federal Rule 804, regarding exceptions to the rule excluding hearsay when the declarant is unavailable to testify at trial.[326] One obvious substantive revision concerns the use of deposition testimony at trial. Georgia adopted Federal Rule 804(b)(1), but added the following sentence: "If deposition testimony is admissible under either the rules stated in Code section 9-11-32 or this Code section, it shall be admissible at trial in accordance with the rules under which it was offered."[327] Thus, when examining the admissibility of deposition testimony under Georgia's new hearsay rule, it is also necessary to examine the admissibility of the deposition testimony under the discovery rules pursuant to which the deposition was taken.

5. Article 2 – A Random Collection of Georgia Rules. In addition to the hearsay rules adapted from Federal Rules of Evidence, Georgia has created an Article 2, which serves as a repository for Georgia's current hearsay code sections that have no direct analogue in the Federal Rules. These sections generally concern party admissions,[328] confessions,[329] medical reports,[330] and testimony of a child's description of sexual contact or physical abuse.[331] Article 2 contains several, but not all, of Georgia's particular hearsay exceptions. A review of the new Code sections beginning with O.C.G.A. § 24-8-820[332] is advisable if you are looking for a particular former Georgia hearsay rule.

6. Authentication and Identification of Documents. Chapter 9 of the new Georgia rules of evidence contains an adaptation of Article IX of the Federal Rules, governing authentication and identification of documents.[333] In addition to analogs of the Federal Rules, Georgia has

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326. *Compare* O.C.G.A. § 24-8-804 (Supp. 2011) (effective Jan. 1, 2013), *with* FED. R. EVID. 804.

327. O.C.G.A. § 24-8-804(b)(1).

328. O.C.G.A. § 24-8-821 (Supp. 2011) (effective Jan. 1, 2013). It is not clear why this exception is necessary at all, given that an admission in a pleading is expressly defined as nonhearsay in O.C.G.A. § 24-8-801(d)(2)(A). *See also* O.C.G.A. §§ 24-8-822 to -823 (Supp. 2011) (effective Jan. 1, 2013).

329. O.C.G.A. §§ 24-8-824 to -825 (Supp. 2011) (effective Jan. 1, 2013).

330. O.C.G.A. § 24-8-826 (Supp. 2011) (effective Jan. 1, 2013).

331. O.C.G.A. § 24-8-820 (Supp. 2011) (effective Jan. 1, 2013).

332. *Id.*

333. *Compare* FED. R. EVID. 901, 902, and 903, *with* O.C.G.A. §§ 24-9-901 to -903 (Supp. 2011) (effective Jan. 1, 2013).

inserted an Article 2, containing five sections addressing the means of authentication for specific types of records and evidence, including: state and county records;[334] medical bills;[335] laws and records of other states;[336] photographs, video, and audio recordings;[337] and driver records.[338] Each of these is an existing Georgia Code section, which has been renumbered.

7. Lost Records. Article XI of the Federal Rules of Evidence contains the "miscellaneous rules,"[339] and has not been adopted by Georgia. In its place, Georgia has included Chapter 11, Articles 1 and 2, respectively, containing its procedures for establishing duplicates of lost or destroyed public records[340] and for establishing duplicates of lost or destroyed papers evidencing indebtedness.[341] A discussion of the substance of these code sections is outside the scope of this Article.

8. Additional Chapters. In addition to the provisions adapted from the Federal Rules of Evidence, the 2013 Georgia Evidence Code will contain Chapters 12, 13, and 14,[342] each containing multiple articles and sections covering topics ranging from confidentiality of medical records to payment of fees to witnesses appearing pursuant to subpoenas.[343] A full discussion of these provisions is outside the scope of this Article, but it should be noted that these additional provisions make up approximately twenty-seven percent of the text of HB 24.[344] Interestingly, the actual portion of HB 24 dedicated to the adaptation of the Federal Rules of Evidence in Title 24 of the Georgia Code accounts for less than forty percent of the legislation.[345]

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334. O.C.G.A. § 24-9-920 (Supp. 2011) (effective Jan. 1, 2013).
335. O.C.G.A. § 24-9-921 (Supp. 2011) (effective Jan. 1, 2013).
336. O.C.G.A. § 24-9-922 (Supp. 2011) (effective Jan. 1, 2013).
337. O.C.G.A. § 24-9-923 (Supp. 2011) (effective Jan. 1, 2013).
338. O.C.G.A. § 24-9-924 (Supp. 2011) (effective Jan. 1, 2013).
339. *See* FED. R. EVID. 1101, 1102, and 1103.
340. O.C.G.A. §§ 24-11-1 to -3 (Supp. 2011) (effective Jan. 1, 2013).
341. O.C.G.A. §§ 24-11-20 to -29 (Supp. 2011) (effective Jan. 1, 2013).
342. *See supra* note 105.
343. *See* O.C.G.A. §§ 24-12-1 to -14-47 (Supp. 2011) (effective Jan. 1, 2013).
344. *See id.*
345. Sections 3-100 of HB 24 make up approximately thirty-four percent of the Act and make modifications to other code sections residing within the Georgia Code, but outside of Title 24. *See also* Hendrix et al., *supra* note 24, at 13-14, App., Table 1 (examining House Bill 24 during the 2010 legislative session, which, as explained above, was virtually the same bill that was finally enacted except as otherwise, and reporting that, in general, these sections served to remove an evidence rule found in another statute, delete unnecessary evidence rules, and/or update references to new sections in Title 24 of the 2013 Georgia Evidence Code).

V. After All

While there is certainly more to be said on many of these points, and future rulings will provide even more fodder for discussion, we hope this Article has provided a helpful overview of the New Georgia Rules of Evidence and will be useful for your practice when the new rules take effect on January 1, 2013.